FILED OCT 1

APR 5 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

..... TERM, 1943

No. 13 Original

In the Matter

of the

Petition of the REPUBLIC OF PERU, owner of the Peruvian Steamship "UCAYALI," for a writ of prohibition and/or a writ of mandamus against the Honorable WAYNE G. BORAH, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the other judges and officers of said court.

PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS

MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
Proctors for the Republic of Peru.

HERBERT M. STATT,
LINDSAY D. HOLMES,
of Counsel.

CORPORATE PRESS, INC., NEW YORK CITY

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IN THE

Supreme Court of the United States

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In the Matter
of the
Petition of the REPUBLIC OF PERU, owner
of the Peruvian Steamship "UCAYALI."

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS

And now comes the Republic of Peru, owner of the Peruvian steamship Ucayali, and moves:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the Honorable Wayne G. Borah, Judge thereof, and the judges and officers of said Court to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why the Republic of Peru should not have such other and further relief therein as may be just.

THE REPUBLIC OF PERU,
By MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
Its Proctors

By EDGAR R. KRAETZER.

IN THE

SUPREME COURT OF THE UNITED STATES,

..... TERM, 1943.

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In the Matter
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Petition of the REPUBLIC OF PERU, owner of the Peruvian Steamship "UCAYALI," for a writ of prohibition and/or a writ of mandamus, against the Honorable WAYNE G. BORAH, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the judges and officers of said court.

PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Republic of Peru, owner of the Peruvian steamship Ucayali, against the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, sitting in admiralty, and against the judges and officers of said Court, respectively represents:

FIRST: That on March 30, 1942, Galban Lobo Company, S. A., alleging that it was a corporation organized and existing under and by virtue of the laws of the Republic of Cuba, filed a libel in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, against Compania Peruana de Vapores

y Dique del Callao and the steamship Ucayali, her engines, 7
boilers, etc., to recover damages in the sum of $100,000, alleged to have been sustained by it as charterer of the vessel and consignee of her cargo, as a result of the discharge of the cargo of said vessel at New Orleans instead of New York, the destination to which the vessel had originally been ordered. The libel prayed that process issue for the seizure, arrest and attachment of the said steamship Ucayali according to the rules and practice of said Court, and that said vessel be condemned and sold to pay said alleged damages. A copy of the libel, as part of the record of the proceedings in said Court, is hereto annexed.

8

SECOND: That, in point of fact, the steamship Ucayali was, since the year 1937, and still is solely and wholly owned by the Republic of Peru and at all the times mentioned in the libel annexed hereto, the vessel belonged to the Republic of Peru. That at the time of the occurrences as a result of which libelant claims damage was occasioned to it by the vessel and her owner, to wit, the diversion to New Orleans as her discharging port and her discharge at New Orleans, the vessel was employed in the transportation of privately owned merchandise from the Republic of Peru to the United States for the public use and benefit of the Republic of Peru and for her immediate subsequent employment was under contract to transport war materials for the United States Army.

9

THIRD: That thereafter and on or about the 9th day of April, 1942, in order to free the vessel from libelant's seizure and in order to enable her to perform her engagement for the transportation of war materials for the United States Army without undue delay, Francisco Olsen, the master of the steamship Ucayali, made and filed his claim in behalf of the Republic of Peru to the said vessel but without prejudice to or waiver of the defense of sovereign immunity. A copy of said claim as part of the record

of the proceedings in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, is hereto annexed.

FOURTH: That thereafter and on or about April 11, 1942, the testimony of Francisco Olsen, master of the steamship Ucayali, was perpetuated in behalf of the Government of the Republic of Peru, de bene esse, for the purpose of showing that the diversion from New York to New Orleans was caused by war conditions, making it unsafe and imprudent for the vessel to proceed to the destination to which she was originally ordered, all within the terms of the charter party and bills of lading issued for the goods. The testimony of Captain Olsen was perpetuated at that time and without awaiting a determination of the motion of the Republic of Peru for a dismissal of the libel on the ground of sovereign immunity for the reason that under present war conditions, the dangers of the seas are so great that it was doubtful whether the said witness would survive a voyage to South America through waters infested by enemy submarines. The testimony was taken under the reservation that it was without waiver of the defense of the Republic of Peru of sovereign immunity, which reservation was not agreed upon by proctors for libelant. In point of fact, steps for the proper and formal institution of the plea of and motion with respect to the defense of sovereign immunity had been instituted prior to the taking of Captain Olsen's deposition on April 11, 1942, to wit, on April 3, 1942, but due to the necessity for the intervention of the Peruvian Government through the Peruvian Embassy, of the Department of State of the United States, and of the United States Attorney General, those measures could not be completed before the departure of Captain Olsen and the steamship Ucayali for the purposes and on the business aforesaid.

A copy of the transcript of the deposition of Captain Olsen as part of the record of the proceedings in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, is hereto annexed.

FIFTH: That thereafter, on various dates, New Orleans 13
proctors for the Republic of Peru obtained three extensions of time within which to answer or otherwise plead to the libel herein, which extensions were required by the necessity of communications between New Orleans and New York proctors for the Republic of Peru, communications between the New York proctors for the Republic of Peru with the officials of that Government in Peru and, most particularly, time to prepare and present the claim of the Republic of Peru for sovereign immunity. The longest delay was occasioned by exchanges of communications between the United States Attorney's office in New Orleans and the Attorney General's office in Washington; without 14
such delay, the extensions of time might not have been necessary, and the Government of Peru might have been able to make its plea of sovereign immunity in proper season.

SIXTH: That thereafter, pursuant to the practice and procedure established in such cases, the Republic of Peru, through the Peruvian Ambassador to the United States, filed its suggestion with the Secretary of State of the United States that it was interested in such proceedings, desired the discontinuance of the action pending and the dismissal of the libel on the ground that the vessel was 15
owned and operated by a friendly sovereign power in the service and interest of the people of the Republic of Peru. The Secretary of State thereupon and under date of May 5, 1942, requested the Attorney General of the United States to instruct the United States District Attorney in New Orleans to present to the Court a certified copy of the suggestion and note of the Ambassador of the Republic of Peru and to state that the Department of State accepts as true the statements of the Ambassador concerning the steamship Ucayali and that the Department of State recognized and allowed the claim of immunity.

SEVENTH: That thereafter, Herbert W. Christianberry, the United States Attorney for the Eastern District of

16 Louisiana, appearing on behalf of the United States for the purpose of presenting the suggestion of immunity of the Peruvian Ambassador, filed of record suggestions that inasmuch as the Ucayali at the time of the matters complained of in the libel, was a vessel belonging to the Republic of Peru, the claim of immunity from liability or lien for alleged breach of contract was recognized and allowed. Copy of said suggestion, as part of the record of the proceedings in said Court, is hereto annexed.

EIGHTH: That thereafter, on motion of Herbert W. Christenberry, United States Attorney for the Eastern Dis-
17 trict of Louisiana, and of proctors in New Orleans for the Republic of Peru, the matter came on for hearing before the Honorable Wayne G. Borah, Judge of the said Court, upon the right and propriety of said Court to assume jurisdiction or otherwise to hear and determine the matters alleged in said libel, who handed down an opinion in which the suggestion of immunity heretofore referred to, was overruled on the ground that the Republic of Peru had, notwithstanding the reservations to the contrary made by the proctors for the Republic of Peru, entered a general appearance in the said cause by obtaining extensions of time within which to answer or otherwise plead and by taking the deposition of Captain Olsen, and waived its
18 immunity to suit. The Court assumed jurisdiction and is proceeding to hear and determine the merits of the libel. A copy of said opinion, as part of the record of proceedings in said Court, is hereto annexed.

NINTH: Thereafter, the Republic of Peru, by its proctors at New Orleans, moved for reargument of the motion for dismissal of the libel on the ground of sovereign immunity and, upon reargument, the previous decision of the Court was affirmed. A copy of the decision of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, as part of the record of the proceedings in said Court, is hereto annexed.

TENTH: That a certified copy of the record of the proceedings in said District Court of the United States for the Eastern District of Louisiana, New Orleans Division, filed in the said cause, is hereto annexed and made a part hereof.

ELEVENTH: That it is now represented that inasmuch as at all the times referred to in the libel in the cause the Ucayali was the property of the Republic of Peru employed by this sovereign for the public uses and benefit of the people of the Republic of Peru, and since the claim to immunity of the Republic of Peru, a friendly sovereign nation, was recognized and allowed by the Government of the United States, through the Secretary of State, she was immune from liability or lien for the alleged damages for breach of charter. Further, that said libel proceedings, in substance and effect, are an action against your friendly sovereign petitioner and present a claim for contract damages arising out of the diversion from a route to New York, to New Orleans because of the then existing submarine menace, and consistent with the practices then employed by the United States Maritime Commission and pursuant to the official orders and directions of the Ministry of Marine of Peru, the Peruvian Government agency having jurisdiction in the premises; and that for the liability of such losses this sovereign petitioner has not consented to suit. By reason thereof, the said District Court was and is without jurisdiction, or should not with propriety have retained jurisdiction, to hear and determine the matters alleged in said libel filed against the said steamship.

WHEREFORE, the said Republic of Peru, the aid of this Honorable Court respectfully requesting, prays:

1. That a writ of prohibition may issue out of this Honorable Court to the said Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and/or the judges and officers of said Court, prohibiting

him and them from taking any step whatsoever in the cause aforesaid and, generally, from the further exercise of jurisdiction therein or the enforcing of any order, judgment or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this Honorable Court directing and commanding the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, to vacate the order so entered by him overruling the exception of the Republic of Peru to jurisdiction, and to enter an order in said cause declaring the said steamship Ucayali immune from liability or lien for the damages claimed in the libel.

3. That the Court grant to the Republic of Peru such other and further relief as may be just in the premises.

THE REPUBLIC OF PERU,
By MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
Its Proctors
By EDGAR R. KRAETZER.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

EDGAR R. KRAETZER.

Sworn to before me this
8th day of January, 1943.

JOHN T. CASEY,
Notary Public.

JOHN T. CASEY
Notary Public Queens County
Queens Co. Clk's No. 338 Reg. No. 3440
N. Y. Co. Clk's No. 816 Reg. No. 4C484
Commission Expires March 30 1944
Notarial Seal

Libel and Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALVAN LOBO CO., S. A. versus COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

To the Honorable the Judges of the United States District Court for the Eastern District of Louisiana:

The libel and complaint of Galvan Lobo Co., S. A. against Compania Peruana de Vapores y Dique Del Callao, and against the Steamship UCAYALI, her engines, boilers, etc., in a cause of contract, civil and maritime, alleges as follows:

I.

At all the times hereinafter mentioned, libelant was and still is a corporation organized and existing under and by virtue of the laws of the Republic of Cuba, and was at all times hereinafter mentioned the charterer of the Steamship UCAYALI.

II.

At all the times hereinafter mentioned, respondent, Compania Peruana de Vapores y Dique Del Callao, was

and now is a corporation organized and existing under and by virtue of the laws of the Republic of Peru, and was at all the times hereinafter mentioned the owner of the Steamship UCAYALI.

III.

On or about the 18th day of November, 1941, respondent, Compania Peruana de Vapores y Dique Del Callao, entered into a charter party with libelant's agent at Callao, Peru, Enrique, Pardo, whereby the said respondent agreed to let and the said libelant agreed to hire the said Steamship UCAYALI for a voyage from ports in Peru to the Port of New York the carriage of 3,600 to 3,700 tons of raw or refined sugar in bags at a freight of $15.00, United States currency, per ton, seventy-five per cent. (75%) of which freight became due and payable at Lima, Peru, upon loading and the balance at New York, upon discharge of the vessel. A copy of said charter party marked "Exhibit A" is annexed hereto.

IV.

The Steamship UCAYALI commenced to load at Peruvian ports on or about March 2, 1942, and seventy-five per cent. (75%) of the agreed freight was thereafter paid by libelant to respondent in accordance with the terms of said charter party.

V.

That on or about March 6, 1942, the said Steamship UCAYALI having loaded 3,600 tons of raw and/or refined sugar in bags, all of which sugar was the property of your libelant sailed from the Port of Pimentel, Peru, for the port of New York, where she was to have discharged said sugar in accordance with the terms of said charter party.

VI.

That for reasons unknown to your libelant, the Steamship UCAYALI, with libelant's sugar on board, put into the Port of New Orleans, Louisiana, on or about the 23rd day of March, 1942, and at all times thereafter wrongfully refused to proceed to the Port of New York as required by said charter party and contrary to the terms of said charter party and contrary to the instructions of your libelant, discharged libelants sugar into warehouses at the Port of New Orleans.

VII.

In the alternative, in the event that this deviation to and discharge at New Orleans does not constitute an unexcused, breach of the charter party, then libelant alleges that it is entitled to the return of the freight heretofore paid to respondent hereunder, or that may hereafter be received or obtained by respondent hereunder, by payment or otherwise.

VIII.

That the existing regulations of the Government of the United States of America with respect to the importation and transportation of sugar from foreign ports to the East Coast of the United States, require that all deliveries of imported sugar from other than Cuban ports be made to ports north of Cape Hatteras; hence, libelant is unable to take delivery of the sugar discharged by the Steamship UCAYALI at New Orleans.

IX.

Libelant has duly performed all and singular the obligations resting upon it under the charter party herein.

X.

By reason of the premises libelant has sustained losses and damages in the estimated amount of One Hundred Thousand Dollars ($100,000.00), no part of which has been paid, although payment has been duly demanded from the respondent by the libelant.

XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays:

1. That process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Steamship UCAYALI, her engines, etc., and that all persons having or claiming any interest therein may be cited to appear and answer in the premises;

2. That citation in due form of law may issue against the respondent herein, Compania Peruana de Vapores y Dique Del Callao, citing it to appear and answer in the premises; that if respondent cannot be found within this district, its goods and chattels, and in particular the Steamship UCAYALI, may be attached by process of foreign attachment for the amount of One Hundred Thousand Dollars ($100,000.00) plus interest and costs;

3. That this Honorable Court may be pleased to decree the payment of said respondent to the libelant its damages;

4. That the said Steamship UCAYALI may be condemned and sold to pay the same, together with interest and costs; and

37

5. That libelant may have such other and further relief in the premises as may be just and proper.

Signed TERRIBERRY, YOUNG, RAULT & CARROLL,
TERRIBERRY, YOUNG, RAULT & CARROLL,
825 Whitney Building,
New Orleans, Louisiana.

Signed MICHELSEN & CHAMBERLAIN,
MICHELSEN & CHAMBERLAIN,
55 Liberty Street,
Borough of Manhattan,
City, County, and
State of New York.

38

39

40 *Verification.*

State of Louisiana, }
Parish of Orleans, } ss.:

BEFORE ME, the undersigned authority, personally came and appeared BENJAMIN W. YANCEY, Who having been first duly sworn did depose and say:

That he is a member of the firm of Terriberry, Young, Rault & Carroll, proctors for libelant; that he has read the foregoing libel, and the matters contained therein are true and correct to the best of his knowledge, information, and belief; that the basis of his belief and the source of his
41 knowledge are statements made to him and papers sent to him by New York counsel for libelant. The reason this affidavit is not made by libelant is that libelant is not in this district and has no agent herein.

Sgd. BENJAMIN YANCEY.

Sworn to and subscribed before
me this 30th day of March, 1942.

Sgd. HAROLD J. ZENINGER
Notary Public

42 (Seal)

Order:

Let admiralty process issue as prayed for.

New Orleans, La., March 30, 1942.

A. DALLAM O'BRIEN, JR.,
Clerk.

By H. W. NIEHUES,
Dep. Clerk.

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Exhibit A—Annexed to Libel and Complaint.

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Cia. PERUANA DE VAPORES Y DIQUE DEL CALLAO

From West Coast of South America — Direct Service — To New York and Intermediate Ports.

#1

RECEIVED ON BOARD [illegible] by Compañía Peruana de Vapores y Dique del Callao:

From Sociedad Agricola Pomalca Ltda. ... on board the Vessel " UCAYALI "

... and now lying in the Port of Salaverry (Perú)

and bound for the Port of New York and intermediate ports with liberty for the vessel ... [illegible]

Nine thousand seven hundred and eight as per margin PACKAGES OF MERCHANDISE.

said to be marked and numbered and as described as per margin, but not having ... to be carried to the Port of New York or as near thereto as she can without risk ... [illegible]

To Order.-Notify Olavarria & C°., Inc., N.Y.

[illegible]

PRODUCT OF PERU S/A S/L

9708 Sacks of grainy sugar gross weight 1087106 kilos

Sacos marcados "Product of Perú"

COPIA

NOT NEGOTIABLE

FOR CONTINUATION OF CONDITIONS SEE BACK

NOTICE. In accepting this Bill of Lading, the Shipper for himself and on behalf of the Consignee or Owner of the goods or holder of the Bill of Lading, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed, or whether in accordance or not with the custom of the Port of Discharge; and the fact of its not being signed by the Shipper shall not prejudice the preceding Clauses, all of which are and shall be binding upon all the parties interested in the same manner and to the same extent, as if each or all of them had signed the Bill of Lading.

IN WITNESS whereof the Master, Purser or Agent of the said vessel hath affirmed to [illegible] Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void, [illegible] one of the Bills of Lading must be given up duly endorsed, in exchange for the goods or for Delivery [illegible]

... 15.60 dollars per ton. de 1016 kilos

Dated in Salaverry (Perú) this 3 [illegible] 19[illegible]

We accept the conditions of this Bill of Lading [illegible]

p. Sociedad Agricola [illegible]

Shippers

[illegible]

FOR THE COMPAÑÍA PERUANA DE VAPORES Y DIQUE DEL CALLAO

Cia. Peruana de Vapores y Dique del Callao — MAR 3 [illegible] — Vapor "Ucayali"

"No claim shall under any circumstances whatever attach to the vessel or her Owners for failure to notify consignees of arrival of goods."

[redacted]

Authorised July, 19[illegible]

Cía. PERUANA DE VAPORES Y DIQUE DEL CALLAO

From West Coast of South America — To New York and Intermediate Ports.

Direct Service

PRODUCT OF PERU
N. 100.000

4854 Sacks of grainy sugar gross weight [illegible] kilos

SHORT SHIPPED 157 SACKS.
Wurst

Sacos marcados "Product of Perú"

Rate of Freight [illegible] dollars per ton, de 1016 kilos

[illegible]

RECEIVED ON BOARD ~~[illegible]~~ by Compañía Peruana de Vapores y Dique del Callao

From Sociedad Agrícola [illegible] Ltda., on board the Vessel "UCAYALI"

whereof [illegible] is Master for the present voyage

and now lying off the Port of Samanco (Perú)

and bound for the Port of New York and intermediate ports with liberty for the vessel [illegible]

[illegible]

Four thousand eight hundred and fifty four as per margin [illegible]

said to be marked and numbered and as described as per margin, but not herein noted, and to be carried to the Port of New York or as near thereto as she can without risk of detention or delay safely get, and be always afloat, and there to be delivered subject to the exceptions and conditions contained in this Bill of Lading, which constitutes the Contract between the Company and the Owners [illegible]

To Order.—Notify [illegible] & Cº., Inc. N.Y. or to his or their Assigns.

The Shippers, Consignees, and Owners of the Goods, or their Agents are described herein as the Shippers. The Owners or Charterers of the Vessel or their Agents are described herein as the Company.

1. The Company shall not be responsible for loss, non-delivery, mis-delivery, delay, detention, damage or injury [illegible]

[illegible]

FOR CONTINUATION OF CONDITIONS SEE BACK

NOTICE. In accepting this Bill of Lading, the Shipper for himself and on behalf of the Consignee or Owner of the goods or holder of the Bill of Lading, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed, or whether in accordance or not with the custom of the Port of [illegible] [illegible]

IN WITNESS whereof the Master, Purser or Agent of the said [illegible] Bills of Lading [illegible] tenor and date, one of which being accomplished, the others to stand void. One of the Bills of Lading must be given up duly endorsed, in exchange for the goods or for Delivery Order.

Dated in [illegible] this [illegible] 19[illegible]

We accept the [illegible]

Shippers [illegible]

FOR THE [illegible] DEL CALLAO

COPIA

NOT NEGOTIABLE

CONDITIONS—Continued.

Cia. PERUANA DE VAPORES Y DIQUE DEL CALLAO

From West Coast of South America

Direct Service

To New York and Intermediate Ports.

- PLEASE NOTIFY HEBBERD OLAVARRIA & CO., - NEW YORK -

SUGAR
& & &
PRODUCT OF PERU

20,000 BAGS REFINED WHITE SUGAR
1,016,000 GROSS KILOS

~~EXCESS OVER (A) BAGS TO BE MEASURED~~

~~SHORT (A) BAGS SAVING AL MAR~~

SHORTSHIPPED EIGHT BAGS

LOST, OVERBOARD FOUR BAGS

- ASSURED BY THE SHIPPER -

"FREIGHT COLLECT"

Rate of Freight

"No claim shall under any circumstances whatever attach to the vessel or her Owners for failure to notify consignees of arrival of goods."

Received for shipment by Compañía Peruana de Vapores y Dique del Callao

[illegible] PERUVIAN GLORY [illegible]

and now lying at the Port of PISAGUA

and bound for the Port of NEW YORK - and intermediate ports with liberty for the vessel to call at any port or ports for any purpose, to sail with or without pilots, to tow and assist vessels in all situations, to go to the assistance of vessels in distress, to deviate for the purpose of saving life and property, to carry contraband, explosives or dangerous goods, to carry passengers, to load or discharge cargo at any port or ports whatsoever, whether in or out of the customary route, whether such ports be in a contrary direction to, or out of, or beyond the destination or intended route to the said Port of Discharge), coal or oil-fuel, all and any stores, bunkers or provisions for trading or discharging cargo or passengers, towing and assisting vessels in all situations, saving life or property, or for the purpose of repairs of the said vessel or any part thereof, or for any purpose whatsoever, or substitute vessels in any manner and for any purpose (such as trading to substitute other voyage or voyages), and all such ports, places and voyages shall be deemed included within the intended voyage; also liberty not being considered as restricted to any route in the premises, whether steamer or steamers, may undergo or tow or assist vessels undergoing trials, and notwithstanding circumstances or influence of the vessel or the commencement or at any period of the voyage, to carry goods of all kinds, whether on deck or under deck, and whether dangerous or otherwise, to substitute or transship the goods in any other vessel, whether owned or chartered by the Company or not, before the commencement of or at any period of the voyage, to proceed, in regard to the aforesaid ports whether with or without the goods on board at the Port of Loading or Discharge or elsewhere, to be stayed, and to sail with or without pilots.

TWENTY THOUSAND THREE HUNDRED AND TWENTY BAGS SUGAR ... BAGGAGE OF SUNDRY WEIGHTS,

said to be marked and numbered as per Margin and to be shipped at the Port of PISAGUA aforesaid, and to be carried to the Port of NEW YORK or so near thereto as the said vessel shall safely get, and be always afloat, and there to be delivered, subject to the exceptions and conditions contained in this Bill of Lading, which constitutes the Contract between the Company and the Shippers, from the vessel's tackle, where the Company's liability shall cease, unto TO ORDER or his or their Assigns.

6. The Shippers, Consignees, and Owners of the goods, or their Agents are described herein as the Owners. The Owners or Charterers of the vessel, or their Agents are described herein as the Company.

7. The Company shall not be responsible for loss, non-delivery, mis-delivery, delay, deviation, damage, or injury occasioned by or arising, in part or in whole, from any of the following perils, causes or things, namely - the act of God, the King's or Country's Enemies, Pirates, Robbers, Thieves, whether by sea or air, or Aircraft Risk in the shape or the Company or not, Barratry of Masters Crew Mariners, Pilots, Stowaways, Explosions, Breakage, Accident Latent Defects or Negligence Default or Error in Navigation or Management of Vessel, Machinery, Boilers, Hull or Appurtenances of Vessel, Fire, Land Water, Collision or Contact with any Vessel Craft or Aircraft or Transport or Conveyance or any part thereof, Perils of the Sea Rivers Canals Navigation, Dangers Accidents of the Sea Rivers Canals Navigation, Jettisons of Cargo, Arrest Restraint or Detainment of Princes Rulers or People, Seizure under Legal Process, Stoppage Loss Arrest Restraint or Detainment of Kings Princes Rulers or People, Quarantine, Insurrection, Civil War, Civil Commotions, Strikes, Lockouts, Labour Disturbances, Riots or Combinations of Workmen, Sabotage, Piracy, Perils of Pirates, Thieves, Robbers, Barratry of Masters Mariners, Explosions, Breakage, Boilers, Machinery, Latent Defects, Negligence, Default or Error in Navigation or Management of Vessel, Collision, Stranding, Perils of the Seas Rivers Navigation, Act of God, Act of War, Act of Public Enemies, Arrest Restraint or Detainment of Princes Rulers or People, Act of Shippers or Owners of Goods or their Agents, Saving or Attempting to Save Life or Property at Sea, Wastage in Bulk or Weight or any Consequence of any of the aforesaid Perils, Causes or Things, whether arising from the act, neglect, default or error of the Master Mariners Pilots or other Servants of the Company or for which the Company is responsible by law or otherwise, or from any latent or other defect in the vessel or her machinery or gear (even if existing at the time of loading the Goods or commencement of the voyage or any of the ports of loading or discharge aforesaid and even if the defect causes any deviation), or from want of due diligence by the Owners of the vessel or any of them or by any one else on their behalf, or from the act neglect default or error of any Pilot Tug Boat or other person employed or not employed by the Company and for whom the Company is responsible by law or otherwise, whether in the service of the vessel or not, or from any other cause or thing of whatsoever kind whether like or unlike the foregoing which does not arise from the actual fault or privity of the Company, but no liability is accepted for fire unless caused by the actual fault or privity of the Company. The Vessel is also to have liberty to sail with or without pilots, to tow and assist vessels in all situations, and to go to the assistance of vessels in distress.

8. This cargo is insured under the conditions of the Company's policy, if it is shipped [illegible] and the Company will not be responsible for any failure to comply with the following requirements, or through their neglect or default, but in such case the responsibility of the Company will be limited to the amount recoverable under the said policy. If the cargo is insured by the Company, the Company will not be responsible for any delay in delivery or damage which may occur in consequence of the insurance not attaching at such time, nor will be for the account of the Company the consequences of the insurance at such time not, will be for the account of the owners of such cargo.

If, in any case, in the opinion of the Master of the vessel or the Company or its agents, it is unwilling to carry the goods, the passage through the Panama Canal would be unsafe or likely to occur the vessel, he shall have liberty to carry the goods to craft or others now forwards them over the Isthmus to Colon by craft or rail, at the risk of the Owners of the goods and at their expense, or to transship the goods on board other vessels or steamers chartered by other carriers, or to retain the goods on board and proceed on his voyage via Magellan Straits.

All Wharfage Charges where incurred on the goods at any place of transhipment, are for account of the goods, and are to be collected as demanded in addition to other freight.

9. In the event of War, Blockade or Hostilities at the Port of Discharge, Delivery or Transhipment, or if the vessel incur risk of Quarantine at such or at any other port, whether included in the intended voyage or not, by reason of Communicable Disease of Infectious Disease on board, or if in the Master's opinion it would be unsafe or likely to cause damage to cargo for discharge at such port, or likely to delay the vessel or be otherwise injurious to her intended voyage to enter or commence or continue discharging or delivering or transhipping cargo at such port, the Master shall have the option and is hereby authorized to discharge the goods into depot, hulk, craft or other vessel necessary for the vessel's safe sail at such other port as may, in the opinion of the Master of the Company, be convenient, in all cases at vessel's or goods' risk and expense, and such discharge shall be a full and complete performance of the contract by the Company (freight being payable in full, whole reasonable extra expenses thereby incurred to be paid by the goods).

In case of War, the Company shall have the faculty of obtaining the vessel at the port without responsibility for any delay in delivery, or may cancel the voyage and have the goods discharged at any above mentioned port at the risk and expense of the Owners and Holders, the Owners being in any way bound by instructions. The Company shall effect the insurance which has caused such detention aforesaid.

10. The Company shall not be accountable for Condition, Quantity, Weight, Measure, Leakage, Breakage, Quality and Value of the goods in general, unless otherwise specially agreed between masters and merchants on the above and other named on the Bill of Lading, and for obliteration of numbers of packages, marks or numbers, and for any loss or damage to any part of vessel, tackle.

11. Cargo for ports not called at by the Vessels of the Company to be forwarded to destination either by Railway, Vessels, Lighters or other Conveyances at the discretion of the Company on the conditions of carriage of the Railway Company, Owners of vessels and other Companies conveying the cargo to its destination, the liability of the Company to cease on delivery to unloading carriers. While any BARGE, Railway, Dock or other Company accepts packages for store, conveyance or transhipment only at Owners' risk unless insurance or other increased rate is paid, the Company will in no case pay such insurance or higher rate for carriage or storage, unless expressly required by the Owners and or Shippers of the goods to do so, the extra charges being payable by them.

FOR CONTINUATION OF CONDITIONS SEE BACK

NOTICE. In accepting this Bill of Lading, the Shipper for himself and on behalf of the Consignee or Owner of the goods or holder of the Bill of Lading, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed, or whether in accordance or not with the custom of the Port of Discharge, and the fact of its not being signed by the Shipper shall not prejudice the preceding Clauses, all of which are and shall be binding upon all the parties interested in the same manner and to the same extent, as if each or all of them had signed the Bill of Lading.

IN WITNESS whereof the Master, Purser or Agent of the said Vessel hath affirmed to PISCO Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void. If [illegible] to Bills of Lading must be given up duly endorsed, in exchange for the goods or for Delivery Order.

Dated in PISAGUA this 6TH day of MAY 1949.

We accept the [illegible] of this Bill of Lading, including [illegible]

Shippers

FOR THE COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO

CIA. PERUANA DE VAPORES
VAPOR "UCAYALI"
CONSIGNEE

CONDITIONS—Continued.

6

Compañía Peruana de Vapores y Dique Del Callao

CONTRATO DE FLETAMENTO.

Entre LA COMPAÑIA PERUANA DE VAPORES Y DIQUE DEL CALLAO, cuya denominacion en adelante será "La Compañía", por un lado, y los Sres. [illegible] por el otro; se ha convenido, mutuamente, en esta fecha, lo siguiente:

1. Los Sres. FLETADORES ---------- embarcarán en [illegible] un puerto peruano — y en la fecha que "La Compañía" indique, pero no antes del Uno de Febrero ---------, ni despues del Veintiocho de Febrero de 1941 ---------, un cargamento de azúcar en sacos ----------, compuesto de Tres mil seiscientos a tres mil setecientas toneladas de Un mil dieciseis kilos con destino a Nueva York ---------- embarque será efectuado al Vapor ---------- "U C A Y A L I", de un mil setecientas ---------- toneladas de registro, actualmente en Viaje al Callao.
SEGURO: MARITIMO COMPLETO, FIRST CLASS.

2. El flete convenido es de DOLLARS ORO AMERICANO ---------- por tonelada de Un mil dieciseis ---- kilos, pagadero en el puerto de embarque, o, a opción de la Compañía, en el Callao, contra entrega del conocimiento firmado. El flete será pagado sobre el peso declarado en el conocimiento; pero "La Compañía" se reserva la opción de rectificar dicho peso durante la descarga, y cobrar flete sobre el exceso que encontrare. EL FLETE [illegible] SERÁ PAGADO EN EL PUERTO Y LA CARGA.

El 75% del flete será pagado en Lima, contra entrega de documentos y el saldo á ser el 25% en New York.

SEGURO CARGA.- Cualquier prima extra de seguro de la carga, será de cuenta de los FLETADORES.

3. El embarque y la descarga del cargamento deberá ser efectuado por los interesados, [illegible] de acuerdo con la cláusula 7a. días hábiles para la primera operación; y [illegible] de acuerdo con la cláusula 7a. días hábiles para la segunda, días que se contarán en ambos casos, desde el momento en que el Vapor ---------- fondee en el puerto y su Capitán avise por escrito, que esta expedito para cargar o descargar, segun sea el caso. Transcurrido dicho numero de días, los Sres. FLETADORES ---------- pagarán a la Compañía la suma de [illegible] por cada día que sea detenido, pago que deberá ser efectuado día á día y al contado.

En caso de que el Vapor --- llegara al puerto despues de las 9 a. m. dicho día será considerado como medio día hábil; y si llegara despues de medio día, no se tomará en consideracion dicho día de llegada.

Se entendido que para los efectos de las sobre-estadías serán, considerados como días hábiles, aquellos que no sean Domingo, días feriados o de braveza de mar; estos últimos deberán ser constatados por el Capitan del Puerto, quien deberá certificar, igualmente, que ningun otro nave ha podido efectuar operaciones de descarga o de embarque en el citado día, por causa de la braveza del mar.

4. El Capitan o el Contador deberá firmar conocimientos de carga de cualquiera parte del cargamento y al tipo de flete, y cualesquiera otras condiciones que le fueran exigidas, sin que tal acto modifique o perjudique, en lo menor, el presente contrato, así como tampoco las condiciones impresas del conocimiento que La Compañía tiene en uso, todas cuyas cláusulas son aceptadas por los Sres. FLETADORES ---------- siempre que ellas no se opongan a las condiciones especiales del presente contrato.

5. Queda expresamente convenido que si el Vapor---- que conduce dicho cargamento no pudiera llegar a su destino - aparte de las causas citadas en la cláusula respectiva del conocimiento - por cualquiera otra independiente de la voluntad de "La Compañía", producida por ordenes emanadas de cualquier Gobierno o Autoridad, legal o ilegalmente constituida, de los puertos de embarque, tránsito o destino, La Compañía se reserva el derecho de descargar el cargamento en dicho puerto o en el más proximo posible, por cuenta y riesgo del interesado, y sin devolver parte alguna del flete percibido; o si tal operación de descarga no fuera posible, regresar el cargamento al puerto de embarque, cobrando en tal caso, un nuevo flete sobre el mismo, en proporcion a las millas de regreso recorridas, sobre la base del flete pactado en el presente contrato.

6. Para el fiel cumplimiento de todo lo estipulado en el presente contrato, se comprometen y obligan, mutuamente, las partes contratantes, en general con sus bienes habidos y por haber, y, en particular, con el cargamento, los Sres. FLETADORES ---------- ; y con sus fletes y nave, La Compañía. La responsabilidad en ningun caso, excederá, para cualquiera de las partes, del monto del flete estipulado, valor que será pagado por la parte infractora del presente contrato a la otra parte.

7a.- El embarque o efectuará a razón de 600 toneladas mínimo por día hábil y la descarga en New York será de 6,000 bultos en [illegible] cada uno ó su equivalente por día ordinario, (con exclusión de Domingos y feriados) bajo la cual los Fletadores pagarán a la Compañía por demora (tiempo perdido) [illegible] y por tiempo grande a su vez la Compañía pagará [illegible]

de [illegible] fletes con destino a [illegible],
"U.C.A.Y.A.L.I", de un mil setecientos ---------- toneladas de registro, actualmente en viaje al Callao.
CARGUERO: RAMLOSE CARGILL, FIRST CLASS.

2. El flete convenido es de DIEZ SOLES ORO AMERICANO ------ por tonelada de un mil dieciocho ---- kilos, pagadero en el puerto de embarque, o, a opción de la Compañía, en el Callao, contra entrega del conocimiento firmado. El flete será pagado sobre el peso declarado en el conocimiento; pero "La Compañía" se reserva la opción de rectificar dicho peso durante la descarga, y cobrar flete sobre el exceso que encontrare. EL FLETE [illegible] SERA PAGADO EN EL PUERTO DE EMBARQUE Y LA CARGA.

El 75% del flete será pagado en Lima, contra entrega de documentos y el saldo á ser el 25% en New York.

SEGURO CARGA.- Cualquier prima extra de seguro de la carga, será de cuenta de los FLETADORES.

3. El embarque y la descarga del cargamento deberá ser efectuado por los interesados, de acuerdo con la cláusula 7a. días hábiles para la primera operación; y de acuerdo con la cláusula 7a. días hábiles para la segunda, días que se contarán en ambos casos, desde el momento en que el Vapor ------ fondee en el puerto y su Capitán avise por escrito, que esta expedito para cargar o descargar, según sea el caso. Transcurrido dicho numero de días, los Sres. FLETADORES ---------- pagaran a la Compañía la suma de CINCO DOLARES ORO AMERICANO ---------- por cada día que sea detenido, pago que deberá ser efectuado día a día y al contado.

En caso de que el Vapor --- llegara al puerto después de las 9 a. m. dicho día será considerado como medio día hábil; y si llegara después de medio día, no se tomara en consideración dicho día de llegada.

Es entendido que para los efectos de las sobre-estadías, serán, considerados como días hábiles, aquellos que no sean Domingo, días feriados o de bravezas de mar; estos últimos deberán ser constatados por el Capitán del Puerto, quien deberá certificar, igualmente, que ningún otro navío ha podido efectuar operaciones de descarga o de embarque en el citado día, por causa de las [illegible] antes dichas.

4. El Capitán o el Contador deberá firmar conocimientos de carga de cualquiera parte del cargamento y al tipo de flete, y cualesquiera otras condiciones que le fueran exigidas, sin que tal acto modifique o perjudique, en lo menor, el presente contrato, así como tampoco las condiciones impresas del conocimiento que La Compañía tiene en uso, todas cuyas cláusulas son aceptadas por los Sres. FLETADORES ---------- siempre que ellas no se opongan a las condiciones especiales del presente contrato.

5. Queda expresamente convenido que si el Vapor ------ que conduce dicho cargamento no pudiera llegar a su destino - aparte de las causas citadas en la cláusula respectiva del conocimiento - por cualquiera otra independiente de la voluntad de "La Compañía", producida por órdenes emanadas de cualquier Gobierno o Autoridad, legal o ilegalmente constituida, de los puertos de embarque, tránsito o destino, La Compañía se reserva el derecho de descargar el cargamento en dicho puerto o en el más próximo posible, por cuenta y riesgo del interesado, y sin devolver parte alguna del flete percibido; o si tal operación de descarga no fuera posible, regresar el cargamento al puerto de embarque, cobrando en tal caso, un nuevo flete sobre el mismo, en proporción a las millas de regreso recorridas, sobre la base del flete pactado en el presente contrato.

6. Para el fiel cumplimiento de todo lo estipulado en el presente contrato, se comprometen y obligan, mutuamente, las partes contratantes, en general con sus bienes habidos y por haber, y, en particular, con el cargamento, los Sres. FLETADORES ---------- ; y con sus fletes y nave, La Compañía. La responsabilidad en ningún caso, excederá, para cualquiera de las partes, del monto del flete estipulado, valor que será pagado por la parte infractora del presente contrato a la otra parte.

7a.- El embarque se efectuará a razón de 800 toneladas mínimo por día hábil y la descarga en New York será de 6,000 sacos de 100 libras cada uno ó su equivalente por día ordinario, con excepción de Domingos y feriados, durante el cual los Fletadores pagarán a la Compañía por demora (tiempo perdido) U.S.$.150.00 y por tiempo ganado a su vez La Compañía pagará U.S.$.75.00 por día ó fracción en parte proporcional, en cada operación.

[illegible] DE LAS CONDICIONES DE FLETE EN EL PRESENTE CONTRATO, SE LAS DE USO LIBRE "GRAIN CHARTER PARTY".

En fé de lo cual, firmamos el presente documento, en el Callao, a los dieciocho días ------ del mes de Noviembre ---- de mil novecientos cuarentisiete.

[illegible]

Por la COMPAÑIA PERUANA DE VAPORES Y DIQUE DEL CALLAO.

Fletador. Gerente.

TESTIGOS.

Compañía Peruana de Vapores y Dique del Callao

AND

Panama Rail Road Co.

IN CONNECTION WITH

DIRECT _____ Line

To NEW YORK

MARKS AND NUMBERS

TULSA
Refinada 7112 Bags grainy sugar
Product of Peru ____ on. 100 kos. c.u.

-Shippers declare insurance has been covered.
-Pilotaje carehargo: So.177.
peruvian currency, paid in

Contents, Weight and Value Unknown

Freight from Ilo to New York
Collect as per agreement.
Per 40 Cubic feet
Per 2,240 lbs. English
Per 1,000 kilos
(100 lbs Spanish 4 Kilos)
Per 100 lbs. English
(101.6 lbs English 100 lbs Spanish)

40

Freight payable on the intaken weight as declared on this Bill of Lading and weight being subject at the option of the carrying Companies to revision on discharge at destination, and freight recoverable on any excess. Bill of Lading for New York must bear consignee's name or have note attached indicating who will despatch the goods

Freight to be paid on the gross weight or measurement respectively subject to correction, and in the case of light rated goods, freight to be paid on the weight received for delivery at Carrier's option.

All goods of Value exceeding £ 200 per ton weight to be charged 1% AD VALOREM in additions to the ordinary rate of freight

No Bill of Lading signed for less than $ ____ am gold. TOTAL $ ____ am. gold.

Received payment

(For the Company)

(The Signature of the Agent here acknowledges only the amount prepaid).

PANAMA CANAL.—The vessel and cargo carrying coastwise between ports of the United States reaching the Panama Canal from the Pacific Ocean will be charged the same tolls as vessels and cargoes engaged in foreign trade.

Subject to the Conditions of Bill of Lading

THROUGH BILL OF LADING. (ISSUE 11 20) No.

Received by The Compañía Peruana de Vapores y Dique del Callao

Shipped at ILO.

Sea.del F.C.Sur Muelle de Ilo (Agente to Ferr Tuma S A)

Seven thousand and one hundred and twelve bags of sugar.

WEIGHT VALUE AND QUANTITY UNKNOWN
BAGS NOT TO BE OPENED
AGF PRODUCED BY IRRIGATION

Consigned to ORDER (Notify: Olaverria & Co. New York) at NEW YORK

To be transported to Steamship " UCAYALI "

Dated.... ILO, Peru, this 4 th day of MAR 1942

Shippers are requested to read this Contract, including Conditions

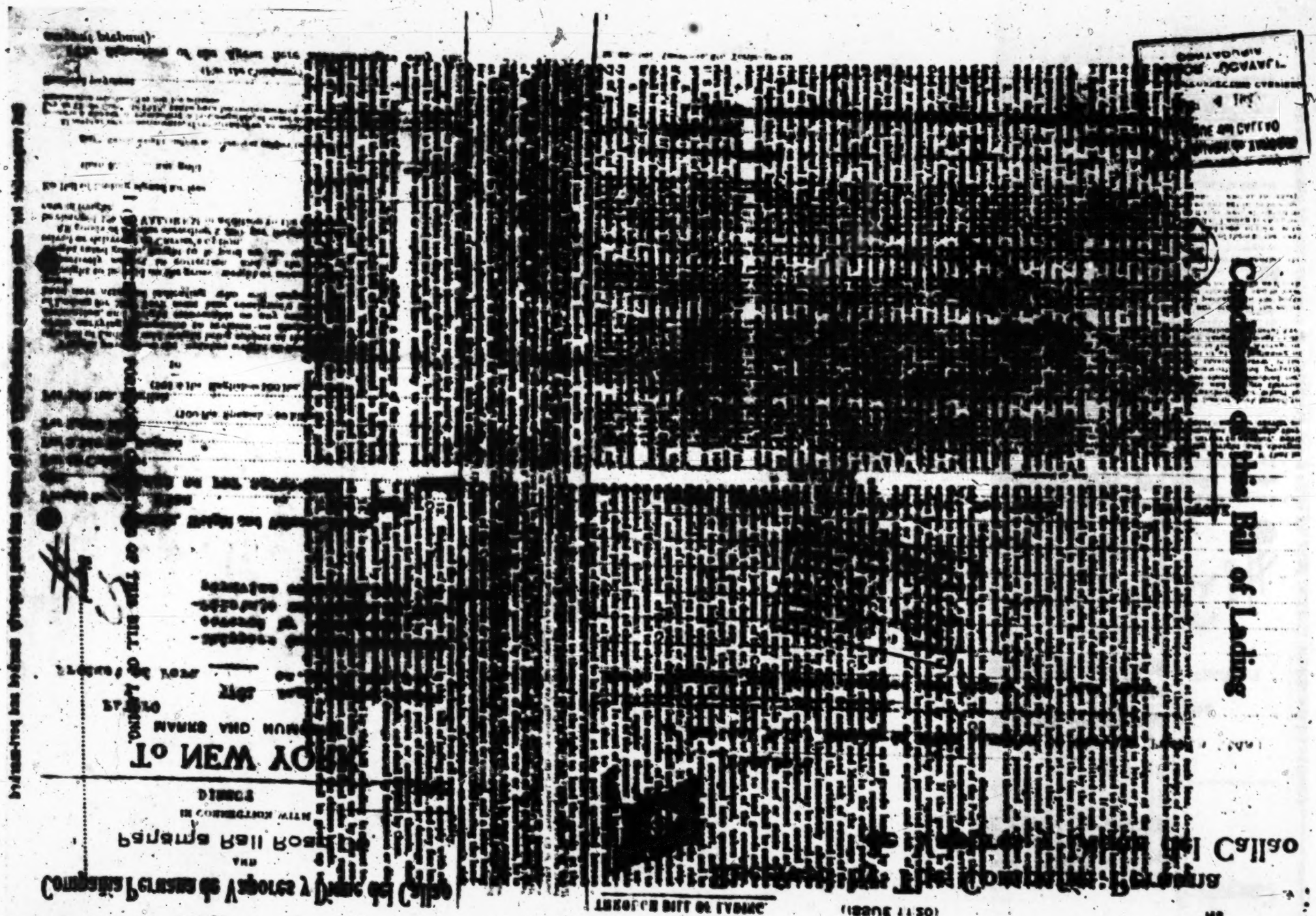
For

Printed in America. Sin Trabajo no ha

CONSIGNED
COMPAÑIA PERUANA DE VAPORES Y DIQUE DEL CALLAO
MAR 4 1942
VAPOR "UCAYALI"
CONSIGNATARIOS

8

6



Compañía Peruana de Vapores y Dique del Callao

AND

Panama Rail Road Co

IN CONNECTION WITH

To NEW YORK

MARKS AND NUMBERS

PACKAGES

Product of Peru

#2

Quantity, Weight and Value

Freight from ... to ...

Per 40 Cubic feet .....

Per 2,240 lbs. English .....

Per 1,000 kilos .....

(100 lbs. Spanish=46 kilos)

Per 100 lbs. English .....

(101.4 lbs. English=100 lbs. Spanish)

LOW CLASS

10

Freight payable on the quantum weight as declared on this Bill of Lading, said weight being subject at the option of the carrying Companies to revision on discharge at destination, and liable recoverable on any error. Bill of Lading for New York must bear consignee's address, have note attached indicating who will despatch the goods.

Freight to be paid on the gross weight or measurement respectively subject to contraction, and in the case of weight rated goods, freight to be paid on the weight delivered or delivered at Carrier's option.

All goods of a value exceeding £ 200 per freight ton will be charged 1% AD VALOREM in addition to the above rate of freight.

No Bill of Lading signed for less than $..... am. gold

Not responsible for extra expense or inhibitory, due to strikes, accidents, or other causes beyond our control.

Received payment .....

(For the Company)

(The Signature of the Agent here acknowledges only the amount prepaid).

TRIPLICATE BILL OF LADING. (ISSUE 1/1/20) No. .....

Shipped by The Compañía Peruana de Vapores y Dique del Callao

Bill of Lading

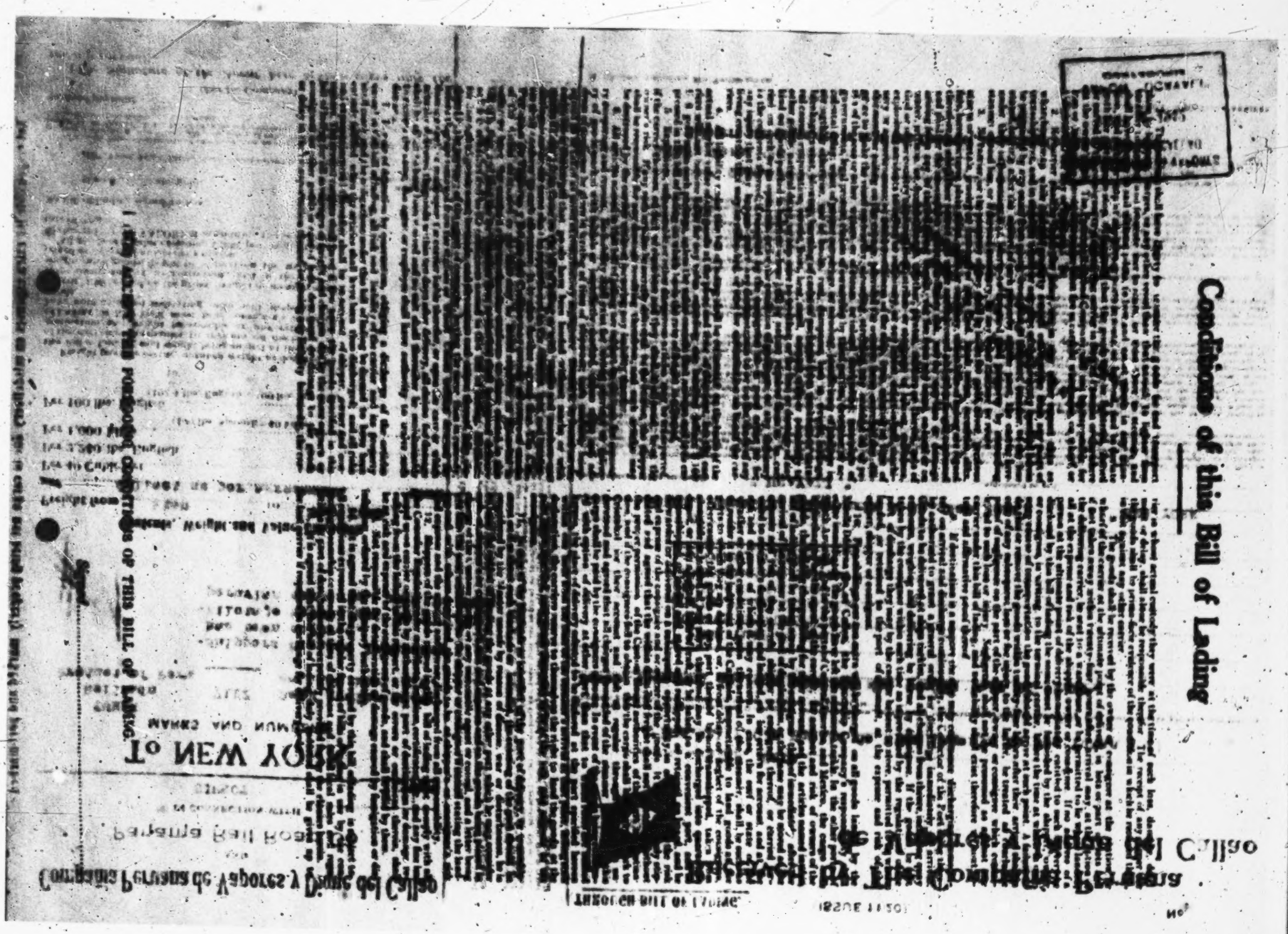
Shippers are requested to read the Conditions of Bill of Lading

COMPAÑIA PERUANA DE VAPORES Y DIQUE DEL CALLAO

MAR 4 1942

MAYOR "UCAYALI"

10



Conditions of this Bill of Lading

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Claim of Owner.

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UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A. versus COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

50

AND NOW appears Republic of Peru, intervening for itself as owner of the S. S. UCAYALI, before this Honorable Court and makes claim to the said S. S. UCAYALI, her tackle, apparel, and furniture, as the same are proceeded against at the instance of GALBAN LOBO CO., S. A., the libelant, and the said claimant Republic of Peru, avers that it was at the time of the filing of the libel herein, and still is, the true and bona fide sole owner of the said S. S. UCAYALI and that no other person is the owner thereof; wherefore it prays to defend accordingly. The filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant particularly but not exclusively sovereign immunity.

51

REPUBLIC OF PERU,
By (Sgd) F. OLSEN.

52 *Verification.*

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared

FRANCISCO OLSEN

being by me first duly sworn, deposes and says that he is the Master of the S. S. UCAYALI, that he signed and executed the foregoing claim on behalf of the Republic of
53 Peru; that he has read said claim and knows the contents thereof to be true and correct.

(Sgd) F. OLSEN.

Sworn to and subscribed before me
this 9th day of April, 1942.

Signed Nicholes Callan
NOTARY PUBLIC
Notl. Publ.

54

Stipulation.

55

STATE OF LOUISIANA
PARISH OF ORLEANS

WHEREAS in the release bond filed on behalf of the Republic of Peru dated April 9th, 1942, upon which National Surety Corporation appeared as surety it was recited that an admiralty warrant issued in the case entitled Galban Lobo Co., S. A., v. Compania Peruana de Vapores y Dique Del Callao and The Steamship Ucayali, commanding the marshall to attach by foreign attachment the SS Ucayali, and

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WHEREAS said recital was in error and said SS Ucayali was attached by process in rem

NOW, THEREFORE, it is agreed that said original bond might be amended by striking out the words "by process of foreign attachment" and substituting therefor the words "by process in rem", and that except as herein amended, all of the contents of said original bond are to remain in full force and effect.

REPUBLIC OF PERU
By Monroe & Lemann

57

NATIONAL SURETY CORPORATION
By S. L. Angno
Attorney-at-Law
SEAL

WITNESSES
T. Hebert
L. Crews

58 **Order Extending Time.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GABAN LOBO CO., S. A. vs. COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLO, and the Steamship 59 "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

On motion of Republic of Peru, respondent and claimant, through its proctors, Monroe & Lemann, who appear herein for the special and limited purpose of presenting this motion and with full reservation and without waiver of any defenses and objection which may be available to mover, particularly but not exclusively, sovereign immu-
60 nity, and on suggesting to the Court that the return day to answer or otherwise plead to the libel herein expires on April 20th, and on further suggesting to the Court that mover requires an extension of at least twenty (20) days to present fully and adequately its pleas and defense to said libel, particularly, but not exclusively, the defense of sovereign immunity;

IT IS ORDERED that the time to answer or otherwise plead to the libel filed herein be and the same is hereby extended for a period of twenty (20) days from April 20th, 1942.

New Orleans, La. April 18th, 1942

Sgd. A. J. CAILLOUET
JUDGE

Order Extending Time.

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UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
New Orleans Division.

GALBAN LOBO CO., S. A. vs. COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLO, and the Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

62

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

On motion of Republic of Peru, respondent and claimant through its proctors, Monroe & Lemann, who appear herein for the special and limited purpose of presenting this motion and with full reservation and without waiver of any defenses and objection which may be available to mover, particularly but not exclusively, sovereign immunity, and on suggesting to the Court that the extended return day to answer or otherwise plead to the libel herein expires on May 10, 1942, and on further suggesting to the Court that mover requires an extension of at least twenty (20) days to present fully and adequately its pleas and defenses to said libel, particularly, but not exclusively, the defense of sovereign immunity;

63

IT IS ORDERED that the time to answer or otherwise plead to the libel filed herein be and the same is hereby extended for a period of twenty (20) days from May 10, 1942.

New Orleans, La. May 8, 1942.

Sgd. Wayne G. Borah

Monroe & Lemann
Nicholas Callan
Proctors for Republic of Peru

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Order Extending Time.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
New Orleans Division.

GALBAN LOBO CO., S. A. vs. COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLO, and the Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

65

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

On motion of Republic of Peru, respondent and claimant, through its proctors, Monroe & Lemann, who appear herein for the special and limited purpose of presenting this motion and with full reservation and without waiver of any defenses and objection which may be available to mover, particularly but not exclusively, sovereign immunity, and on suggesting to the Court that the return day to answer or otherwise plead to the libel herein expires
66 on May 30th, 1942, and on further suggesting to the Court that mover requires an extension of at least thirty (30) days to present fully and adequately its pleas and defenses to said libel, particularly, but not exclusively, the defense to sovereign immunity;

IT IS ORDERED that the time to answer or otherwise plead to the libel filed herein be and the same is hereby extended for a period of twenty (20) days from May 30th, 1942.

New Orleans, La. May 29th, 1942

Sgd. A. J. Caillouet
U. S. District Judge

Monroe & Lemann
Attys. for Mover.

Notice of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A. versus COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of *Nicholas Callan* verified the 17th day of June, 1942, the letter of His Excellency M. de Freyre y Santander, Ambassador of the Republic of Peru to the United States, to the Honorable Sumner Welles, Acting Secretary of State, dated April 15, 1942, the letter of the Honorable Sumner Welles to the Honorable Francis Biddle, Attorney General of the United States, dated May 5, 1942, and the letter of the Honorable Francis Biddle to Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, dated May 8, 1942, copies of which will be submitted to the Court upon the argument of this motion, by the United States Attorney for the Eastern District of Louisiana, and upon the suggestion of immunity filed by Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, and the libel and complaint heretofore filed herein, the undersigned

Notice of Motion.

will move this Court at a Stated Term for the hearing of motions, appointed to be held in the United States Court House, on the 24th day of June, 1942, at ten-thirty o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the suit of Galban, Lobo Co., S. A. against Compania Peruana De Vapores y Dique del Callao and the steamship Ucayali, her engines, etc., for want of jurisdiction on the ground that said suit is against the property of a friendly foreign sovereign nation, to wit; the Steamship Ucayali, not subject to the jurisdiction of this Honorable Court and immune from suit therein, and for such other and further relief as to the Court may seem just in the premises.

Dated, New Orleans, La., June 17th, 1942.

Yours, etc.,

MONROE & LEMANN,
Proctors for the Republic of Peru,
appearing specially,
Whitney Building,
New Orleans, La.

To:

TERRIBERRY, YOUNG, RAULT & CARROLL, Esqs.,
Proctors for Libelant,
Whitney Bank Building,
New Orleans, La.

HERBERT W. CHRISTENBERRY, Esq.,
United States Attorney for the
Eastern District of Louisiana,
United States Court House,
New Orleans, La.

Affidavit of Nicholas Callan, in Support of Motion. 73

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A. versus COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty 74

State of Louisiana, }
Parish of Orleans, } ss.:

Nicholas Callan, being duly sworn, deposes and says: He is a member of the firm of Monroe & Lemann, proctors in the above entitled admiralty suit for the Republic of Peru, which is the owner of the Peruvian steamship Ucayali, and appears specially herein solely for the purpose of this motion and not otherwise. 75

Your deponent's firm has been authorized in behalf of the Government of the Republic of Peru and by His Excellency M. de Freye Y Santander, Ambassador of the Republic of Peru to the United States, to make this motion for the dismissal of the above entitled action for want of jurisdiction and to press the immunity of the steamship Ucayali as a vessel owned by the Republic of Peru, a friendly sovereign nation.

This affidavit is made in support of a motion to dismiss the libel in the above entitled action for want of jurisdiction and to present to this Court the sovereign immunity

of the Republic of Peru and its property, to wit, the Peruvian Government owned vessel Ucayali, from process and suits in the courts of the United States.

The above entitled action was instituted on the 30th day of March, 1942, by the libelant against the steamship Ucayali, her engines, boilers, etc., and against Compania Peruana de Vapores y Dique del Callao, agent for the Republic of Peru in the operation of its steamship Ucayali, to recover the sum of $100,000 as the result of damages alleged to have been sustained by the libelant because of the discharge of the vessel's cargo of sugar originally destined to the port of New York, at New Orleans due to war conditions, to the orders of the Peruvian Government, and to the exercise of the master's discretion, all pursuant to the terms of certain bills of lading issued for the goods. The libelant claims to be the owner of the sugar cargo then on board the steamship Ucayali and entitled to the delivery of the goods at the port of New York. Libelant claims alternatively that it is entitled to a return of the freight theretofore claimed to have been paid to the respondent.

As appears from the affidavit, sworn to at Lima, Peru, the 20th day of April, 1942, of Manuel V. Galdo, Captain of the Peruvian Navy and duly commissioned Director of the Port Captain's Bureau (the original of which affidavit and translation are annexed hereto as Exhibits A and A1), the Peruvian Steamship Ucayali was formerly the Yugoslavian steamship Neti, owned prior to August, 1937, by the Marovic Steamship Company, Ltd. The Government of Peru purchased the vessel by a contract of sale dated at London, England, August 24, 1937. A true copy of the purchase agreement is annexed hereto, marked Exhibit B and by this reference made a part hereof. The vessel was duly delivered, and a bill of sale executed on November 6, 1937, the bill of sale being executed before the Consulate General of the Kingdom of Yugoslavia in Triest, Italy. A true copy of the bill of sale is annexed hereto, marked

Exhibit C and by this reference made a part hereof. Thereafter, the Ucayali made a voyage to Peru under provisional letters patent or certificate of registry issued by the Peruvian Consulate at Rotterdam, Holland, on November 12, 1937, (a true copy of the provisional letters patent is annexed hereto, marked Exhibit D and by this reference made a part hereof) and the vessel has continuously remained in the possession ownership and service of the Republic of Peru under the agency for the benefit of the Republic of Peru, of the respondent, Compania Peruana de Vapores y Dique del Callao.

As stated, the steamship Ucayali is and has continuously been since November 6, 1937, the property of a friendly sovereign nation and is and is to be employed in the service and interest of the whole Peruvian nation and not for the benefit of any individual. A suit against the steamship Ucayali is a suit against the property of a friendly foreign sovereign nation.

As appears by the records in Court, the steamship Ucayali was arrested by the United States Marshal for the Eastern District of Louisiana on the 30th day of March, 1942, and such arrest was made by the Marshal pursuant to process issued against the vessel in the above entitled suit.

The arrest of the steamship Ucayali by the United States Marshal for the Eastern District of Louisiana at the instance and request of the above named libelant was effected without the consent of the Peruvian Government or any branch, agency or accredited representative. The arrest in fact was made by the Marshal at the instance of the above named libelant notwithstanding the fact that the ownership of the vessel by the Government of the Republic of Peru is a matter of public knowledge. This arrest was likewise made notwithstanding the immunity of the vessel from suit or arrest and without waiver of such immunity or consent of the Peruvian Government to any of its property being sued.

82 *Affidavit of Nicholas Callan.*

On April 14, 1942, His Excellency M. de Freyre y Santander, Peruvian Ambassador to the United States, filed with the Honorable Sumner Welles, Acting Secretary of State of the United States, a letter presenting the attitude of the Peruvian Government in respect of the status of the steamship Ucayali and asserting the interest of the Peruvian Government in said vessel and the immunity of said vessel from process, with the plea that the suit herein be dismissed and the arrest of the Peruvian steamship Ucayali be vacated.

83 The Honorable Sumner Welles, Acting Secretary of State of the United States, on the 5th of May, 1942, requested the Honorable Francis Biddle, Attorney General of the United States of the District of Louisiana to instruct the United States to appear in this proceeding and present to the Court a certified copy of the note of April 15, 1942, of the Peruvian Ambassador and "to say that this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali* and recognized and allows the claim of immunity."

Annexed hereto and marked Exhibit E is a copy of the note dated April 15, 1942, from the Peruvian Ambassador to the Acting Secretary of State of the United
84 States. The exhibits referred to in the aforementioned note or photostatic copies will be presented to this Court with the suggestion of immunity filed by the United States Attorney for the Eastern District of Louisiana.

The United States Government recognizes that the Republic of Peru is a friendly foreign sovereign government and that His Excellency W. de Freyre y Santander is the duly accredited Ambassador of the Republic of Peru to the United States, and therefore, under the rule of comity and the circumstances presented herein, it is respectfully submitted that the libel should be dismissed and the arrest vacated under the authority of Ex Parte Muir, 254 U. S. 522; *The Navemar,* 102 F. (2d) 444; *Sullivan* v. *State of*

85

Sao Paulo, 36 F. Supp. 503 affirmed 122 F. (2d) 355; *Katingo Hadjipatera,* 40 F. Supp. 546; *Maliakos,* 41 F. Supp. 697; *Ioannis P. Goulandris,* 40 F. Supp. 924; and *Margaret-Tassia,* 41 F. Supp. 699.

No previous application for the relief sought herein has heretofore been made in the above entitled action.

WHEREFORE, The Republic of Peru respectfully prays that this Court decline jurisdiction in the above entitled suit and that an order be made herein dismissing the above entitled action for want of jurisdiction on the ground that such suit is brought against the property on a friendly foreign sovereign nation, to wit, the steamship Ucayali, not subject to the jurisdiction of this Court and immune from suit therein, and that a further order be entered vacating the arrest of the steamship Ucayali pursuant to process issued against the vessel in the above entitled action, with costs.

86

Sgd. NICHOLAS CALLAN.

Sworn to before me this
17th day of June, 1942.

WATTS K. LEVERICH,
Notary Public.

87

Exhibit A—Annexed to Foregoing Affidavit.

[redacted]

No. 562-Admiralty
U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
FILED JUN 17 1942
Deputy Clerk

AFFIDAVIT

YO, Capitán de [redacted], MANUEL V. GALDO, por el presente afirmo que ejerno el cargo de Director de Capitanías, desde el 21 de Diciembre de 1939 y que por razón del mismo tengo conocimiento oficial de los hechos siguientes:

PRIMERO.- Que el vapor "UCAYALI", ex-"NEVI", fué adquirido por el Gobierno del Perú, de la firma naviera MAROVIC STEAMSHIP COMPANY LTD., segun convenio celebrado en Londres en 24 de Agosto de 1937, con intervención de la Legación del Perú en esa Capital, y de los Corredores C.W.KELLOCK & Cº LTD.

SEGUNDO.- Que la entrega del buque antes citado y la firma del documento de compra del mismo se realizaron el 6 de Noviembre de 1937, por ante el Consulado General del Reino de Yugoeslavia en Trieste (ITALIA).

TERCERO.- Que consta del documento expedido por el Consulado General del Reino de Yugoeslavia en Rotterdam (HOLANDA), con fecha 10 de Noviembre de 1937, que el barco materia de la compra, se hallaba libre de toda hipoteca ó afectación y que su matrícula yugoeslava había sido debidamente cancelada.

CUARTO.- Que el citado ex-"NEVI", hoy vapor "UCAYALI", viajó al Perú bajo patente provisional expedida por el Consulado del Perú en Rotterdam en 12 de Noviembre de 1937.

QUINTO.- Que el [redacted] vapor "UCAYALI", desde su arribo al Perú fué entregado bajo el régimen establecido de administración a la Compañía Peruana de Vapores y Dique del Callao, siendo los provechos y utilidades que de tal administración se derivan como menos una comisión de administración, del beneficio del Gobierno del Perú.

SEXTO.- Que acompaño el presente copia fotostática de los documentos mencionados en el presente Affidavit.

[redacted]

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En fé de lo cual y en ejercicio de las funciones de
arriba que ejerzo, expido el presente bajo juramento.
Dado á [illegible] dias del mes de Abril del año de mil novecientos
cuarentidos.

Alvarado

REPUBLIC OF PERU
PROVINCE OF LIMA
CITY OF LIMA
EMBASSY OF THE UNITED
STATES OF AMERICA
} SS:

Subscribed and sworn to before me, this
20 th day of April, 1942.

John C. Shillock, Jr.,
Consul of the United States of America.
Fee $2.00 - S/ 13.00 Peruvian Cy.
Service no. 99

AMERICAN CONSULATE GENERAL
[redacted]
CALLAO LIMA PERU

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Exhibit A-1—Annexed to Foregoing Affidavit.

[redacted]

AFFIDAVIT

I Manuel V.Golda Captain of the Peruvian Navy do by these presents affirm that I am the duly commissioned Director of the Port Captain's Bureau as of 26th December 1936 and because of the performance of my duties as such have official knowledge of the following facts:

1.- That the [redacted] "UCAYALI" was purchased by the Peruvian Government from the [redacted] STEAMSHIP COMPANY LTD., under a purchase agreement entered into in the City of London on the 24th day of August 1937 with the intervention of the Peruvian Legation in said Capital City and the firm of brokers styled C.N.KELLOCK & Co.Ltd.

2.- That the delivery of the vessel aforementioned and the date upon which the bill of sale of same took place on Nov.6-1937 before the Consulate General of the Kingdom of Yugoslavia in Trieste,Italy.

3.- That as per the instrument issued by the Yugoslavia Consulate federal at Rotterdam Holland bearing date Nov.10th 1937 the vessel which was the subject matter of said purchase was free of any encumbrances and [redacted] and that her previous registry had been duly cancelled.

4.- That the said ex-[redacted] presently "UCAYALI" travelled to Peru under a provisional letters patent issued by the Peruvian Consulate at Rotterdam on Nov.12th 1937.

5.-That the aforementioned "UCAYALI" was turned over unto the Compañia Peruana de Vapores from date of arrival to Peru.Under the existing administration arrangement all profits derived therefrom less an administrative commission being for the benefit of the Peruvian Government.

6.-That I attach hereto photostatic copies of all documents referred to in the present Affidavit, in witness whereof and within the performance of my official duties I have these presents under oath.

Callao eighteenth day of April of the year onetheussand ninehundred and

Exhibit A

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forty two.

(Signed)
Manuel V. Galdo

(A seal which reads:
(Ministry of Marine and Aviation -
(Bureau of Port Captains.

REPUBLIC OF PERU
PROVINCE AND CITY OF
LIMA
EMBASSY OF THE UNITED
STATES OF AMERICA
SS:

Subscribed and sworn to before me, this 20th day of April, 1942.

(Signed)
John C. Shillock, Jr.
Consul of the United States of America.

Fee $2.00 - S/ 13.00 Peruvian Cy.
Service No.990

I, David H. Potter, do hereby declare under oath that the within translation of an Affidavit made by Capt. Manuel V. Galdo is, according to my best knowledge of the English and Spanish languages, a true and faithful English translation from its text in Spanish.

D H Potter
David H. Potter.

REPUBLIC OF PERU
PROVINCE OF LIMA
CITY OF LIMA
EMBASSY OF THE UNITED
STATES OF AMERICA

Subscribed and sworn to before me, this 20th day of April, 1942.

[redacted]
John C. Shillock, Jr.
Consul of the United States of America.
Fee $2.00 - S/ 13.00 Peruvian Cy.
Service No.990

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Exhibit B—Annexed to Foregoing Affidavit.

COPY.

C. W. KELLOCK & CO., LTD.

Brokers for the Sale, Purchase and Construction of Ships, Steamers, &c.
Valuers, Auctioneers.

BROKERS TO THE MARSHAL OF THE ADMIRALTY BY APPOINTMENT
VALUERS TO THE ADMIRALTY.

27-31 ST. MARY AXE, LONDON, E.C.3
CUNARD BUILDING, LIVERPOOL, &

Memorandum of Agreement made this [illegible] day of [illegible]

between [illegible]

of the one part, and [illegible]

of the other part.

No. 1.—The said Vendors agree to sell and the said Purchasers agree to buy [illegible] subject to the conditions hereinafter expressed [illegible] named the [illegible] of about [illegible] and [illegible] tons net register, at present on passage and bound to [illegible] but [illegible] to be delivered to the said Purchasers [illegible] on their approval on inspection of hull, [illegible] and including the sum of [illegible] as per [illegible] with everything belonging to her on board and on shore ([illegible] as provided) including spare gear and chronometer (if any).

No. 2.—The said Purchase Money shall be paid in cash to [illegible]

A deposit of 10 per cent. to be paid on signing of this [illegible] to Kellock & Co. Limited, to be held by them pending [illegible] per balance within [illegible] five [illegible] business days from [illegible] of the requirements of Clause No. 5 hereof.

No. 3.—All unbunkered provisions, [illegible] to remain [illegible] on board all (whether in tanks or [illegible] as shall be paid for by Purchasers at the current [illegible]

Exhibit C

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No. 4.—The Vendors shall, at their own risk and expense, open up (and afterwards close up) the engines, boilers and tanks for inspection afloat and Purchasers' examination within 72 hours of receiving notice of vessel's readiness for inspection. The Purchasers shall notify Vendors in writing their acceptance or rejection of the said vessel within twenty-four hours after completion of said inspection. If Purchasers decline the vessel on inspection afloat, this Agreement shall be void, and the deposit shall be returned to Purchasers, but if they accept the vessel, the purchase shall thereupon become absolute.

No. 5. After Purchasers' approval of vessel on inspection afloat, as referred to in Clause No. 4, the Vendors shall, as soon as possible, at their own risk and expense, place the vessel in dry-dock and draw tail-end shaft for Purchasers' examination. If the bottom, tail-end shaft, propeller or any other under-water part be found damaged, broken or defective, the Vendors shall make good to the satisfaction of Lloyd's Surveyor only such damage or defects as may be necessary for the maintenance of present class without reference to Special Survey, and all expenses in connection with the dry-docking and undocking of vessel shall be borne by the Vendors. Should such damage or defects be discovered to the bottom, tail-end shaft, propeller or other under-water part, the expenses in connection with the dry-docking and undocking of vessel shall be borne by the Purchasers. The expense of drawing and replacing the tail-end shaft shall be borne by the Purchasers unless the tail-end shaft shall be damaged or defective, in which case it shall be borne by the Vendors.

No. 6. Vendors shall at the time of transfer, hand to Purchasers all plans of the vessel, Lloyd's classification certificates, anchor and chain certificates, etc., which may be in their possession.

No. 7. The Wireless Installation, Auto Alarm, Direction Finder and Submarine Signalling Apparatus (if any) are not included in the sale. The Purchasers shall, make their own arrangements with the owners of such Installation and or Apparatus prior to vessel's dry-docking in accordance with Clause No. 5, and failing their so doing the Vendors shall be at liberty to have same removed prior to delivery of vessel to Purchasers.

No. 8. The vessel is sold subject to all restrictions of the Russian Government or any Departments of such State now in force, or which may be enacted between the date of sale and the time fixed for the completion thereof.

No. 9. Should the vessel become a total or constructive total loss prior to the time fixed for delivery to Purchasers, this Agreement shall be void and the deposit shall be returned to Purchasers.

No. 10. On the payment of the whole of the agreed Purchase Money, together with any other sum payable to Purchasers under this Agreement, the Vendors shall, within the time herein specified, and at the expense (if any) of the Purchasers, Consular and Notarial fees, if any) of the Purchasers execute, or procure to be executed to them or their nominees, a legal transfer of the said vessel free from all encumbrances and maritime liens, and the vessel with everything that is sold with her as herein-mentioned, shall be thereupon delivered to them. Subject to the provisions mentioned herein, the vessel and everything that is sold with her shall be taken with all faults and errors of description, without any allowance or abatement for deficiency, error or misdescription in advertisements, circulars, inventories, or otherwise, and shall be at the risk and expense of the Purchasers from the time the balance of the Purchase Money

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o.4a Sender ... arture, after approval of vessel on inspection flight in Trieste as referred to in clause No.4, to forthwith despatch vessel to a ... port in ballast or with cargo at their option and ... iver the vessel to Purchasers in a U.K. port after drydocking in accordance with Clause No.5, free of average and with class fully maintained.

Any duties, taxes or fees ... payable to ... Government on transfer of vessel from ... Flag to ... are for Vendors account and any duties, taxes or fees ... to the Peruvian Government are for Purchasers account.

It is understood that Vendors have already ... new winches.

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payable, whichever is the earlier. Should the whole of the Purchase Money not be paid in the manner and within the time herein specified and/or if any other default shall be made by the Purchasers in the execution of this Agreement, the deposit in full shall be immediately forfeited to the Vendors, to whom Messrs. C. W. Kellock & Co. Limited are hereby authorised to pay it, and the vessel may, notwithstanding negotiations and without notice, be resold by Vendors by public or private sale, and all expenses and any loss arising from the resale together with interest thereon at the rate of £5 per cent. per annum, shall be paid to the Vendors by the present Purchasers. If default shall be made by the Vendors in the execution of a legal transfer, or in delivery of the vessel, in the manner and within the time herein specified, Messrs. C. W. Kellock & Co. Limited are hereby authorised to return forthwith to the Purchasers the deposit paid, and unless the default shall have arisen from events over which the Vendors have no control, the Vendors shall, in addition, make due compensation for the damages (if any) caused to the Purchasers by non fulfilment of this Agreement.

[illegible] any dispute or difference should arise in connection with this Agreement, or the same shall be referred to a single Arbitrator in London, to be appointed by the parties hereto; but if the parties cannot agree upon a single Arbitrator, they shall each appoint an Arbitrator, and the Arbitrators so appointed shall appoint an Umpire, and the award of such Arbitrator or Umpire shall be final and binding upon the parties hereto, and may for the purpose of this Agreement be made a Rule of Court. Save as aforesaid the provisions of the Arbitration Acts 1889 to 1934, and of any Statutory Amendment thereof shall apply.

Brokerage as agreed, is due from the Vendors to Messrs. C. W. Kellock & Co. Limited, upon the signing of this Contract.

[illegible]

Witness [illegible]

[illegible]

[illegible]

Witness

P.S.D. 41887.

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Exhibit C—Annexed to Foregoing Affidavit.

Form No.

BILL OF SALE. (Body Corporate.)

No. 794

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Exhibit D—Annexed to Foregoing Affidavit.

NSULADO DEL PERU

CAD.

ROTTERDAM,

GONZALO ARRIZ, COBSUL DEL PERU EN ROTTERDAM,

Por cuanto Don D.W.Potter, ha solicitado en este Consulado patente provisional de navegación para el buque a vapor "ALTI" de 2768.34 toneladas brutas de registro, matriculado primitivamente en el puerto de Sisak (Yugoeslavia), cuyo capitán es por ahora el mismo señor Don D.W.Potter y va a zarpar próximamente, con tripulación provisional, de este puerto de Rotterdam con destino a diversos puertos europeos y norteamericanos para continuar viaje al puerto del Callao, para inscribirse en la matrícula de la marina mercante nacional.

(El buque a vapor "ALTI" que, llevará en adelante el nombre de "U C A Y A L I", ha sido comprado por el Gobierno del Perú, representado al efecto por Don D.W.Potter, Superintendente Marítimo de la Comisión Peruana de Tenores.)

Por tanto, en uso de las facultades de que me halla investido, he venido en expedir al dicho buque a vapor "U C A Y A L I" ex "ALTI" la presente patente provisional de navegación, para que en virtud de ella pueda enarbolar el pabellón del Perú en los viajes que hasta su llegada al Callao haga, la cual patente provisional será entregada para su cancelación al Capitán del mencionado puerto, llegada que sea la nave.

En cuanto a ella, pido a todos los comandantes de los buques de la armada y mercantes de la República, a los capitanes de los puertos y otros cualesquiera jefes o dependientes de la misma, no pongan embarazo ni causen molestia o detención al expresado Don D.W.Potter o a su buque, antes bien le auxilien con lo que necesitare para su regular navegación.

Y a las autoridades de los estados amigos o neutrales, ruego que, asimismo, no le impidan su libre navegación, salida o detención, en los puertos a que por algún accidente se condujere, permitiéndole se provea de lo que necesitare, cuyo fin le expido la presente, firmada por mí y sellada con el sello del Consulado del Perú en Rotterdam a los doce días del mes de noviembre de mil novecientos treintisiete.

CONSULADO DEL PERU EN ROTTERDAM

G.Arriz
Cónsul

No.de orden 1
Exenta de derechos consulares por tratarse de una nave adquirida por el Gobierno del Perú

CONSULADO DEL PERU EN ROTTERDAM

Master
Corresponde
OC 083617

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Letter Requesting Continuance. 115

TERRIBERRY, YOUNG, RAULT & CARROLL

Whitney Bank Building
New Orleans

June 27, 1942

A. Dallam O'Brien, Jr., Esquire
Clerk, United States District Court
New Orleans, Louisiana

Galban Lobo Co., S. A. versus Compania Peruana de Vapores Y Dique Del Callao and the Steamship UCAYALI, her Engines, Boilers, etc.—No. 562 in Admiralty 116

Dear Mr. O'Brien:

I confirm conversation this morning in which I advised you that Mr. Callan of Messrs. Monroe & Lemann agrees to a continuance of his motion in the above case, which is based on a suggestion yet to be filed by the United States Attorney, from Wednesday, July 1st, to Wednesday, July 8th. I understand that you will arrange this continuance. Thank you very much.

117

Yours very truly,

JOS. M. RAULT.

JMR:L
CC: Mr. Nicholas Callan
c/o Messrs. Monroe & Lemann
Whitney Building
New Orleans, Louisiana

118 **Suggestion of Immunity.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A. *Libellant,* against COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc. *Respondents.*	No. 562 In Admiralty

To the Honorable the Judges of the United States District Court for the Eastern District of Louisiana:

120 Now comes Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, and at the direction of the Attorney General of the United States, respectfully files this Suggestion of Immunity with respect to the Peruvian Steamship UCAYALI, and informs the Court as follows:

I. Under date of April 15, 1942, the Peruvian Ambassador presented to the State Department a claim of sovereign immunity for the Peruvian Steamship UCAYALI, which vessel is owned and in the possession of his Government and which was sent to the port of New Orleans by the Ministry of Marine.

II. Under date of May 5, 1942, the State Department having accepted as true the statements of the Peruvian

Ambassador and having recognized and allowed the claim of immunity for the said Steamship UCAYALI, requested the Attorney General of the United States to instruct me to present to this Court the attached certified copy of the Ambassador's note and to say that the State Department accepts as true the statements of the Ambassador concerning the Steamship UCAYALI, and recognized and allows the claim of immunity.

III. Under date of May 8, 1942 the Attorney General of the United States forwarded to the undersigned the original letter from the State Department to the Attorney General, together with the attached certified copy of the Ambassador's note to the Acting Secretary of State and directed that I, by appropriate suggestion, present to this Court the claim of immunity made on behalf of the Peruvian Government and subsequently recognized and allowed by the State Department to the end that this immunity may be recognized by this Court.

IV. Attached hereto and made a part hereof are the original letter from the State Department together with certified copy of the note of the Peruvian Ambassador transmitted therewith, and the original letter from the Attorney General referred to above in Paragraphs I, II and III.

V. By reason of the premises it has been conclusively determined that the said Peruvian Steamship UCAYALI Proceeded against herein, is immune from the jurisdiction and process of this Court and the claim of immunity having been "recognized and allowed by the Executive Branch of the Government, it is the duty of this Court to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction". *The Navemar*, 303 U. S. 68.

124 *Suggestion of Immunity.*

WHEREFORE, the undersigned by direction of the Attorney General of the United States advises this Court of the foregoing communications and suggests and prays that the claim of immunity made on behalf of the said Peruvian Steamship UCAYALI and recognized and allowed by the State Department be given full force and effect by this Court; that the said vessel proceeded against herein be declared immune from the jurisdiction and process of this Court; that any process of this Court heretofore issued against the said vessel be vacated; and that said vessel be released
125 from any arrest, attachment, seizure or other process that may have been or may hereafter be issued against or served on the said vessel or those in charge of her; and for such other and further relief as to the Court may seem just.

Signed HERBERT W. CHRISTENBERRY
UNITED STATES ATTORNEY
EASTERN DISTRICT OF LOUISIANA

New Orleans, Louisiana,
June 29th, 1942.

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Papers Annexed to Suggestion of Immunity. 127

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C.

May 8, 1942

Herbert W. Christenberry, Esq.,
United States Attorney,
New Orleans, La.

Re: Peruvian Steamship UCAYALI

Sir: 128

I am in receipt of a letter from the State Department, dated May 5, 1942, the original of which is enclosed herewith, requesting me to instruct you to present to the United States District Court for the Eastern District of Louisiana a claim of Immunity, made on behalf of the Peruvian Government with respect to the Peruvian Steamship UCAYALI, which claim has been recognized and allowed by the State Department.

According to the note from the Peruvian Ambassador, the said Steamship UCAYALI is now in the port of New Orleans and has been libeled in an action, *in rem,* in the United States District Court for the Eastern District of 129
Louisiana in an action entitled Galban, Lobo Co., S. A. Versus Compania Peruana de Vapores y Dique Del Callao, and the Steamship UCAYALI, her engines, boilers, etc.

I direct, therefore, that by appropriate suggestion you present the claim of immunity, made on behalf of the Peruvian Government and subsequently recognized and allowed by the State Department, to the attention of the United States District Court for the Eastern District of Lousiana, presenting to said Court a copy of the communication of the Peruvian Ambassador and of the letter from the State Department to me, and that you take all appropriate steps to the end that this immunity may be recognized by the said Court.

130 *Papers Annexed to Suggestion of Immunity.*

The original letter from the State Department, dated May 5, 1942, and the certified copy of the note from the Peruvian Ambassador to the State Department, dated April 15, 1942, transmitted therewith, are enclosed herewith for presentation to the Court, together with your Suggestion of Immunity.

Respectfully,

Signed FRANCIS BIDDLE,
FRANCIS BIDDLE,
131 Attorney General.

Enclosures

DEPARTMENT OF STATE

WASHINGTON

May 5, 1942

In reply refer to
Le 311.2354 Ucayali/1

My dear Mr. Attorney General:

132 Enclosed herewith is a copy of a note of April 15, 1942 from the Peruvian Ambassador concerning the libeling of the Peruvian steamship UCAYALI in the port of New Orleans. It is stated in the note that:

> "The steamship Ucayali is owned by and is in the possession of the Peruvian Government but has been libeled in an action in rem in the United States District Court, Eastern District of Louisiana, New Orleans Division, in an action entitled 'Galban, Lobo Co., S. A. versus Conpañia Peruana de Vapores y Dique del Callao and the steamship Ucayali, her engines, boilers, etc.' "

It is further stated in the note that:

> "The vessel is under engagement to transport materials for the United States Army and thereafter she will be, as heretofore, engaged in the transportation of merchandise produced in the Republic of Peru to the United States or to other friendly countries."

The Department has been orally informed by the Embassy that the *Ucayali* was purchased by the Peruvian Government in 1937 from Yugoslavia and was transferred 134
from Belgian registry; that it has been operated by the Government of Peru through the Cia Peruana, and that the orders to put in at New Orleans were issued by the Ministry of Marine.

The

The Honorable
FRANCIS BIDDLE,
Attorney General.

The Department has also been orally informed by an official of the Maritime Commission that the vessel was ordered by the Peruvian Government to go into the port 135
of New Orleans instead of the port of New York, its original destination, because of the submarine menace. This official also stated that the libelant in this cause, Galban, Lobo Co., S. A., is a Cuban concern.

With reference to the statement in the Ambassador's note that the *Ucayali* is under contract to transport materials for the United States Army, this Department has been informed by an official of the Water Transport Service, War Department, that the vessel now has on board a cargo to be carried to Panama for the War Department.

The Department will appreciate it if you will instruct the United States District Attorney in New Orleans to present to the court the attached certified copy of the

Ambassador's note and to say that this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali,* and recognizes and allows the claim of immunity.

Sincerely yours,

For the Secretary of State:
Sgd. SUMNER WELLES,
Under Secretary.

Enclosure:
137 From Peruvian
Ambassador.
April 15, 1942.

No. 2075
UNITED STATES OF AMERICA
DEPARTMENT OF STATE

To All to Whom These Presents Shall Come, GREETING:

I certify that the document hereunto annexed is a true copy from the files of this department.

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In testimony whereof, I, Cordell Hull, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my
SEAL name subscribed by the Director of Personnel of the said Department, at the City of Washington, in the District of Columbia, this 28th day of April, 1942.

Signed CORDELL HULL,
Secretary of State.

By EDWARD YARDLEY,
Director of Personnel.

PERUVIAN EMBASSY

WASHINGTON, D. C.

April 15, 1942.

Your Excellency:

I have the honour to request Your Excellency's good offices in order that in accordance with the procedure established by the decision of the Supreme Court of the United States in the cases of *Ex Parte Muir,* 254 U. S. 522; *The Navemar,* 102 F. (2d) 444; *Sullivan* v. *State of Sao Paulo,* 140
36 F. Supp. 503, affirmed 122 F. (2d) 355; *Katingo Hadjipatera,* 40 F. Supp. 546; *Maliakos,* 41 F. Supp. 697; *Ioannis P. Goulandris,* 40 F. Supp. 924; and *Margaret Tassia,* 41 F. Supp. 699, Your Excellency kindly make the proper indication to the Attorney General of the United States or other competent judicial authority to the end that the United States District Court for the Eastern District of Louisiana vacate the suit and the process to which is subjected the Peruvian steamship Ucayali.

The steamship Ucayali is owned by and is in the possession of the Peruvian Government but has been libeled in an action in rem in the United States District Court, 141
Eastern District of Louisiana, New Orleans Division in an action entitled "Galban, Lobo Co., S. A. versus Compañia Peruana de Vapores y Dique del Callao and the steamship Ucayali, her engines, boilers, etc." The Peruvian government does not desire the continuation of the action at present pending but that the libel be dismissed on the ground that the vessel is owned and operated by a friendly sovereign power in the service and interest of the people of the Republic of Peru.

The vessel is under engagement to transport materials for the United States Army and thereafter she will be, as heretofore, engaged in the transportation of merchan-

142 *Papers Annexed to Suggestion of Immunity.*

dise produced in the Republic of Peru to the United States or to other friendly countries.

The

His Excellency Sumner Welles,
Acting Secretary of State,
Washington, D. C.

The Peruvian Government accordingly prays that Your Excellency's Department will affirmatively make a suggestion to the Attorney General that the appropriate United States Attorney be instructed to file a suggestion of sov-
143 ereign inmunity in which the State Department will state that it recognized the contents of this appeal and desires the suit referred to to be dismissed.

Please accept, Your Excellency, the renewed assurances of my highest consideration.

M. de Freyre y Santander.

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Notice of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A. versus COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

Sirs:

PLEASE TAKE NOTICE that upon the letter of His Excellency M. de Fredre y Santander, Ambassador of the Republic of Peru to the United States, to the Honorable Sumner Welles, Acting Secretary of State, dated April 15, 1942, the letter of the Honorable Sumner Welles to the Honorable Francis Biddle, Attorney General of the United States, dated May 5, 1942, and the letter of the Honorable Francis Biddle to the undersigned, United States Attorney for the Eastern District of Louisiana, copies of which have been submitted to the Court, a suggestion of immunity has been filed by the undersigned, United States Attorney for the Eastern District of Louisiana, and the undersigned will move this Court at a stated term for hearing of motions appointed to be held in the United States Court House, New Orleans, Louisiana, on the 1st day of July, 1942, at 10:30 o'clock in the forenoon of the day or as soon thereafter as counsel can be heard, for an order dismissing the

148 *Notice of Motion.*

suit of Galban, Lobo Co., S. A. versus Compania Peruana de Vapores y Dique del Callao and the Steamship UCAYALI, her engines, etc., for want of jurisdiction on the ground that with respect to the Peruvian Steamship UCAYALI a claim of sovereign immunity was recognized and allowed by the said State Department and that the said Steamship UCAYALI is not subject to the jurisdiction of this Honorable Court, and immune from suit therein, and for such other and further relief as the Court may deem just in the premises.

149 Dated, New Orleans, Louisiana, June 29, 1942.

Respectfully,

(Signed) HERBERT W. CHRISTENBERRY,
HERBERT W. CHRISTENBERRY,
United States Attorney.

To:
MESSRS. TERRIBERRY, YOUNG, RAULT & CARROLL,
Proctors for Libellant,
Whitney Building,
New Orleans, Louisiana.

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Minute Entry, June 24, 1942.

151

Borah, j:

No. 562 (Admiralty)
GALBAN LOBO COMPANY, S. A.,
Versus
COMPANIA PERUANA de VAPORES Y DIANE DEL CALLAO
and Steamship "UCAYALE," etc.

By agreement and with consent of the Court,

IT IS ORDERED that the application of Republic of Peru for an order dismissing action in this cause, be continued to July 1st, 1942 at 10:00 o'clock A. M.

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Minute Entry, July 1st, 1942.

Borah, j:

No. 562 (Admiralty)
GALBAN LOBO COMPANY, S. A.,
Versus
COMPANIA PERUANA de VAPORES Y DIANE DEL CALLAO
and Steamship "UCAYALI," etc.

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On motion of L. V. Cooley, Jr., Assistant United States Attorney.

IT IS ORDERED that the application of the Republic of Peru for an order to dismiss this cause, be continued until WEDNESDAY, July 8th, 1942, at 10:00 o'clock A. M.

154 **Minute Entry, July 8, 1942.**

Borah, j:

No. 562 (Admiralty)
GALBAN LOBO COMPANY, S. A.,
Versus
COMPANIA PERUANA de VAPORES y DIANE DEL CALLAO
and Steamship "UCAYALE," etc.

This cause came on this day to be heard on the application of Republic of Peru for an order dismissing action.

155 Present: Jose Rault (Terriberry, Young, Rault and Carroll) Attorneys for Plaintiff,
Nicholas Callan (Monroe & Lemann) Attorneys for Defendant and Republic of Peru,
L. V. Cooley, Jr., appearing on behalf of the United States,

After hearing arguments of Proctors for the respective parties, the matter was submitted, and the Court took time to consider.

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Bond.

STATE OF LOUISIANA
PARISH OF ORLEANS

KNOW ALL MEN BY THESE PRESENTS That we, the Republic of Peru as Principal and National Surety Corporation as Surety, are held and firmly bound unto H. C. Richardson for the benefit of whom it may concern in the sum of Sixty Thousand ($60,000) Dollars lawful money of the United States of America, for the payment whereof to the United States Marshal, for the benefit of whom it may concern, his successor and successors, we jointly and severally bind ourselves, our successors, administrators and assigns firmly by these presents.

WITNESS our respective hands and seals hereunto affixed by us at the City of New Orleans, this 9th day of April, 1942.

WHEREAS an admiralty warrant lately issued out of the Honorable Court of the United States of America for the Eastern District of Louisiana, New Orleans division in the suit entitled Galban Lobo Co., S. A. versus Compania Persuana de Vapores y Dique Del Callao and The Steamship Ucayali, Her Engines, Boilers, Etc., commanding the Marshal to attach by process of foreign attachment the SS UCAYALI which said vessel has been attached accordingly, but has been released from seizure and delivered to the Republic of Peru by reason of the signing, sealing and delivery of these presents, the said Republic of Peru having filed a claim to said vessel which is now of record in the Clerk's office of this court:

Now the condition of the above obligation is such that if said claimant and surety abide by all of the orders interlocutory or final of the Court and pay the libellants the amount awarded by final decree rendered in the Court to

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which the process is returnable, or in any appellate court, then the foregoing obligation is to be voided, but otherwise it will remain in full force and effect. The filing of this bond is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant particularly but not exclusively sovereign immunity.

REPUBLIC OF PERU
BY *Monroe and Lemann*
NATIONAL SURETY CORPORATION

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BY. *T. L. Angen*
Attorney-in-fact
SEAL

Witnesses:
T. Hebert
L. Crews

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, a Corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, N. Y., both made, constituted and appointed, and does by these

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presents make, constitute and appoint *Thomas L. Avegno,* of *New Orleans* and State of *Louisiana* its true and lawful Attorney(s)-in-Fact with full power and authority hereby conferred in its name, place and stead, to execute, acknowledge and deliver, *any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; provided, however, that the penal sum of any one such instrument executed hereunder shall not exceed ONE HUNDRED THOUSAND ($100,000.00) Dollars,* and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the corporation and duly attested by its Secretary, hereby ratifying and confirming

all that the said Attorney(s)-in-Fact may do in the premises. Said appointment is made under and by authority of the following provisions of the By-Laws of NATIONAL SURETY CORPORATION.

"ARTICLE XII. RESIDENT OFFICERS AND ATTORNEYS-IN-FACT.

"Section 1. The President, Executive Vice-President or any Vice-President may, from time to time, appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Corporation and the President, Executive Vice-President or any Vice-President, the Board of Directors or the Executive Committee may at any time suspend or revoke the powers and authority given to any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact, and also remove any of them from office.

"Section 4. ATTORNEYS-IN-FACT. Attorneys-in-Fact may be given full power and authority for and in the same and on behalf of the Corporation, to execute, acknowledge and deliver, any and all bonds, recognized, contracts of indemnity and other conditional or obligatory undertakings, and any and all notices and documents cancelling or terminating the Corporation's liability thereunder, and any such instrument so executed by any such Attorney-in-Fact shall be as binding upon the corporation as if signed by the President and sealed and attested by the Secretary.

"Section 7. ATTORNEYS-IN-FACT. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, contracts of indemnity, or other conditional or obligatory undertakings, and they are also authorized and

166 empowered to certify to copies of the By-Laws of the corporation or any Article or Section thereof.

IN WITNESS WHEREOF, NATIONAL SURETY CORPORATION has caused these presents to be signed by its Vice-President, attested by its Assistant Secretary, and its corporate seal to be hereto affixed this *28th* day of *August,* A. D. 19*39*.

NATIONAL SURETY CORPORATION
By S. G. Drake
Vice-President

167 (SEAL)

ATTEST: A. N. MACDOUGALL
Assistant Secretary

168

Verification. 169

State of New York, }
County of New York, } ss.:

On this *28th* day of *August,* A. D. 19*39,* before me personally came *S. G. Drake* to me known, who, being by me duly sworn, did depose and say, that he resided in the City of New York, that he is Vice-President of NATIONAL SURETY CORPORATION, the Corporation described in and which executed the above instrument; that he knows the seal of said Corporation that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he 170
signed his name thereto by like order. And said *S. G. Drake* further said that he is acquainted with *A. N. MacDougall* and knows him to be an Assistant Secretary of said Corporation; and that he executed the above instrument.

Wm. A. McDowan
Notary Public

State of New York, }
County of New York, } ss.:

I, *H. Hussenetter,* Resident Assistant Secretary of NATIONAL SURETY CORPORATION, do hereby certify that the 171
above and foregoing is a true and correct copy of a Power of Attorney; executed by said National Surety Corporation, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation at the City of New York, N. Y., this *9* day *April,* A. D., 19*42.*

Sgd. H. Hussenetter
Resident Assistant Secretary

172 **Answer.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A. versus COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO 173 and The Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

To the Honorable the Judges of the United States District Court, Eastern District of Louisiana:

Now comes Galban Lobo Co., S. A., libelant, through its undersigned proctors, and for answer and return to the suggestion of immunity and motion to dismiss filed herein
174 by Honorable Herbert W. Christenberry, United States Attorney for the Eastern District of Louisiana, and to the motion to dismiss filed by the Republic of Peru, through its proctors, Messrs. Monroe & Lemann says:

1. Libelant puts movers on proof that this is a suit against the property of a friendly foreign nation.

2. Libelant denies that at the time of the events referred to in the libel and at the time of the seizure of the Steamship UCAYALI, and at the time of the claiming and bonding thereof the Steamship UCAYALI was in the possession of the Republic of Peru.

Answer.

3. Libelant denies that the Steamship UCAYALI is not subject to the jurisdiction of the court or immune from process.

4. Libelant shows that if, at the time of the seizure, the Steamship UCAYALI was the property of and in the possession of a friendly foreign nation, to-wit, the Republic of Peru, that any immunity to which the vessel or the Republic of Peru may have been entitled to at that time has been waived by actions in this case by the Republic of Peru which constitute a general appearance:

(a) By filing as respondent and claimant a claim to said vessel dated April 9, 1942;

(b) By filing a surety release bond, dated New Orleans, April 9, 1942, in the sum of $60,000.00, whereon the Republic of Peru is principal, and National Surety Corporation is surety, agreeing to "abide by all of the orders interlocutory or final of the court and pay the libelant the amount awarded by final decree rendered in the court to which the process is returnable, or in any appellate court", which bond was amended by the Republic of Peru and the National Surety Corporation on April 13, 1942;

(c) By taking the testimony of Francisco Olsen, Master of the Steamship UCAYALI, on April 11, 1942, on the merits of the case, and offering in evidence through this witness Peru Exhibits 1 to 6 inclusive (being charter party on which this libel is based and bills of lading), all notwithstanding that libelant, through its proctor, dictated into the record at the beginning of said testimony the following notice and objection:

> "Mr. Rault: I wish to say on behalf of libelant that we shall take the position that the testimony of the captain of the UCAYALI and the appearance of

178 *Answer.*

counsel is a general appearance and waiver of any plea of sovereign immunity, or any plea connected therewith."

Copy of the testimony of said Francisco Olsen, master of the Steamship UCAYALI, taken on the merits of this case, and photostatic copies of said Peru exhibits 1 to 6 inclusive, are annexed hereto and made part hereof.

(d) By filing an ex parte motion for and obtaining and filing an order of the court dated April 18, 1942, extending
179 "the time to answer or otherwise plead to the libel," for a period of 20 days from April 20, 1942, and by filing ex parte motions for and obtaining and filing orders from the court granting further similar extensions on May 8, 1942, and on May 29, 1942.

Attached hereto as part hereof is the affidavit of Jos. M. Rault in support of this answer and return, which libelant prays may be read as a part hereof.

And now having fully answered, libelant prays, the premises considered, that said motions and the plea of immunity be denied, and that the Republic of Peru, respondent and claimant herein, be required to answer the
180 libel herein.

GALBAN, LOBO CO., S. A.,
By MICHELSEN & CHAMBERLAIN,
and
TERRIBERRY, YOUNG, RAULT & CARROLL,
By: (Signed) JOS. M. RAULT,
Proctors.

Verification. 181

State of Louisiana
Paris of Orleans

BEFORE ME, the underisgned authority, personally came and appeared Jos. M. RAULT, who after being first duly sworn did depose and say:

That he is a member of the firm of Terriberry, Young, Rault & Carroll, proctors for libelant; that libelant is a Cuban corporation and has no officer within this district; that he has read the foregoing answer and return, and the matters set forth therein are true and correct to the best of his knowledge, information and belief. 182

(Signed) Jos. M. RAULT.

Sworn to and subscribed before
me this 7th day of July, 1942.

(Signed) W. W. YOUNG,
Notary Public.

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184 **Affidavit of Jos. M. Rault, Annexed to and Forming Part of the Answer and Return of Libelant to the Motion and Suggestion of Immunity Filed by the United States of America and to the Motion of the Republic of Peru.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

185 GALBAN LOBO CO., S. A. versus COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

State of Louisiana
Parish of Orleans
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BEFORE ME, the undersigned authority, personally came and appeared Jos. M. RAULT, who after being duly sworn did depose and say:

(1) I am a member of the firm of Terriberry, Young, Rault & Carroll, New Orleans, proctors for libelant in this case, and have been actively in charge of libelant's interests in this case from the inception of this litigation.

(2) On March 30, 1942, I filed on behalf of libelant a libel in rem in this court against the Steamship UCAYALI seeking to recover losses and damages in the estimated

amount of $100,000.00, growing out of a breach of a contract of carriage between the libelant's agent at Callao, Peru, and Compania Peruana de Vapores y Dique del Callao, alleged on information and belief to be the owner of the Steamship UCAYALI. Admiralty process in rem was issued on that day by the Clerk of the United States District Court, the warrant of arrest being received by the Marshal on the same day. The UCAYALI was seized by the United States Marshal on March 31, 1942, and from that time until released on bond remained under seizure in the custody of the Marshal.

188 In order to make it unnecessary for the proctors representing the vessel to obtain an order of court fixing the amount of the bond, I, in accordance with the usual practice, on April 1, 1942, addressed a letter to the United States Marshal, captioned with the title of this case, and reading as follows:

> "This is to advise you that the libelant is agreeable to having the SS UCAYALI released from seizure upon the posting of a surety release bond in the sum of $60,000.00."

189 The original of this letter was delivered to the office of Messrs. Monroe & Lemann, proctors for the UCAYALI.

(3) On April 9, 1942, a sworn claim for the UCAYALI was filed by the Republic of Peru, in which it alleged itself to be the owner of the UCAYALI and stated that it "prays to defend accordingly." This claim further stated "the filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant particularly but not exclusively sovereign immunity."

On the same day a surety release bond, dated April 9th, in the Amount of $60,000.00, whereon the Republic of Peru was principal, and the National Surety Company was

surety, was filed for the release of the UCAYALI. This bond though containing a reservation identical with that contained in the claim was otherwise in the usual form, the condition of the bond being

> "that if said claimant and surety abide by all the orders interlocutory or final of the court and pay the libelant the amount awarded by final decree rendered in the court to which the process is returnable, or in any appellate court, then the foregoing obligation is to be voided, but otherwise it will
191 remain in full force and effect."

We noted that through inadvertence this bond contained a recital that the admiralty warrant had been issued by way of foreign attachment. We called this to the attention of proctors for the Republic of Peru and they thereupon, on April 13, 1942, filed an amendment to the bond substituting the words "by process in rem" for the words "by process of foreign attachment."

(4) We were advised by proctors for the Republic of Peru that they desired to take the testimony of the master
192 of the UCAYALI. We attended at their office on April 11, 1942, at which time the testimony of Francisco Olsen, master of the UCAYALI, was taken on the merits of the case.

Before the testimony began, Mr. Nicholas Callan, of the firm of Monroe & Lemann, proctors for the Republic of Peru, stated as follows;

> "Mr. Callan: The testimony of Francisco Olsen, the master of the Peruvian Steamship Ucayali, is taken with full reservation and without waiver of all defenses and objections which may be available to respondent and claimant, particularly but not exclusively sovereign immunity; and the appearance of counsel for the Government of Peru and the

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Steamship Ucayali is for the special purpose only of taking the testimony of the master under the reservation aforesaid."

I, as proctor for libelant, then stated as follows:

"Mr. Rault: I agree to the taking of the testimony of the master by consent at the offices of Messrs. Monroe & Lemann on Saturday, April 11, 1942, and agree to waiving, signing, sealing, certification and filing and all the other formalities provided by the de bene esse statute. I, however, do not agree to any reservation or attempted reservation as to the plea of sovereign immunity or any other plea that may in fact be waived by the taking of the testimony of the master."

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Francisco Olsen, having been duly sworn, began his testimony on direct examination as follows:

"DIRECT EXAMINATION

Mr. Callan:

Q. Captain, you are the master of the Steamship Ucayali?

A. Yes, sir."

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I then, on behalf of libelant, made the following statement:

"Mr. Rault: I wish to say, on behalf of libelants, that we shall take the position that the testimony of the Captain of the Ucayali and the appearance of counsel is a general appearance and waiver of any plea of sovereign immunity, or any plea connected therewith."

Mr. Callan then proceeded with the direct examination of the master, in which there were brought out many facts dealing with the merits of the litigation. During the course

196 *Affidavit of Jos. M. Rault.*

of the testimony the Republic of Peru, through Mr. Callan, put in evidence six exhibits marked respectively Peru Exhibits 1 to 6 inclusive, being as follows:

1. Peru Exhibit 1, charter party covering the UCAYALI between La Compania Peruana de Vapores y Dique del Callao and Mr. Enrique Pardo of Lima (alleged by libelant to be its agent);

2. Peru Exhibits 2, 3, 4, 5 and 6, bills of lading issued by the Compania Peruana de Vapores y Dique
197 del Callao covering cargo loaded by the UCAYALI at various ports.

None of these documents contain any reference to the alleged ownership and possession of the Republic of Peru. Indeed, Clause 6 of the charter party reads, in part, as follows:

"6. For the faithful fulfillment of all the stipulations in the present contract, the contracting parties mutually commit and bind themselves; THE CHARTERERS with their worldly goods, present and future, especially the cargo; and La Compania
198 with its freight and *its Steamer.*" (Emphasis mine.)

The master, though claiming that the Republic of Peru owned the vessel, testified that Compania Peruana de Vapores y Dique del Callao acted in all respects as owner of the vessel (testimony p. 29); that it signed the ship's copy of the charter party that had been placed in evidence; that its name appears on all the bills of lading put in evidence; that the freight money under the charter party was paid to it (testimony p. 29); that it paid the master, officers, and crew of the UCAYALI, furnished her with all supplies, including bunkers, and gave all the orders in connection with

the vessel at Peru, including all orders at loading and bunkering ports (testimony pp. 27-28).

5. The return day on which answer or other pleading was due by the claimant and respondents in accordance with the rules of court was April 20, 1942.

On April 18th "the Republic of Peru, respondent and claimant, through its Proctors, Monroe & Lemann," on ex parte motion obtained the following order from the court:

> "On motion of Republic of Peru, respondent and 200
> claimant, through its proctors, Monroe & Lemann, who appear herein for the special and limited purpose of presenting this motion and with full reservation and without waiver of any defenses and objection which may be available to mover, particularly but not exclusively, sovereign immunity, and on suggesting to the Court that the return day to answer or otherwise plead to the libel herein expires on April 20th, and on further suggesting to the Court that mover requires an extension of at least twenty (20) days to present fully and adequately its pleas and defenses to said libel, particularly, but not ex- 201
> clusively, the defense of sovereign immunity;
>
> IT IS ORDERED that the time to answer or otherwise plead to the libel filed herein be and the same is hereby extended for a period of twenty (20) days from April 20th, 1942.
>
> New Orleans, La. April 18, 1942.
>
> (Signed) A. J. CAILLOUET
> Judge"

It will be noted that the motion requested the Court for an extension of 20 days:

202 *Affidavit of Jos. M. Rault.*

> "to present fully and adequately its pleas and defenses to said libel, particularly, *but not exclusively,* the defense of sovereign immunity"; (emphasis mine)

and that the order as prayed for by the Republic of Peru gave the requested extension of 20 days:

> *"to answer or otherwise plead* to the libel filed herein" (emphasis mine).

203 On May 8th and May 29, 1942, further ex parte motions were filed by "Republic of Peru, respondent and claimant, through its proctors, Monroe & Lemann," and further orders of court in similar terms obtained granting additional extensions.

6. I submit that under the established jurisprudence the foregoing actions of the Republic of Peru constitute a general appearance and that the attempted reservations made by it in taking such actions are unavailing; that the plea of sovereign immunity if it was ever well founded has been voluntarily waived by the actions of the Republic of Peru in filing claim for the vessel, in effecting its release
204 by bonding it, in taking the testimony of the master of the UCAYALI on the merits of the case, and in invoking the power of the court to grant an extension of time in which to answer or otherwise plead. I submit that the suggestion of immunity and the motions filed in connection therewith should be overruled and that the Republic of Peru, respondent and claimant, should be required to answer the allegations of the libel.

(Signed) Jos. M. RAULT.

Sworn to and subscribed before me
this 7th day of July, 1942.

(Signed) W. W. YOUNG,
Notary Public.

Testimony.

205

IN THE UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A. vs. COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLO, and the Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty

206

Testimony of Francisco Olsen, witness on behalf of Respondents in the above entitled cause, taken pursuant to stipulation of counsel before Ferdinand E. Zimmer, a Notary Public in and for the Parish of Orleans, State of Louisiana, at the offices of Messrs. Monroe & Lemann, 1424 Whitney Building, New Orleans, on Saturday, April 11, 1942.

APPEARANCES:

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Messrs. MICHELSEN & CHAMBERLAIN AND TERRIBERRY, YOUNG, RAULT & CARROLL (Mr. Rault), Proctors for Libelant.

Messrs. MONROE & LEMANN (Mr. Nicholas Callan), Proctors for Respondents.

Mr. Callan: The testimony of Francisco Olsen, the master of the Steamship Ucayali, is taken with full reservation and without waiver of all defenses and objections which may be available to respondent and claimant, particularly but not exclusively sovereign immunity; and the appearance of counsel for the Government of Peru and the Steamship Ucayali is for the special purpose only of taking the testimony of the master under the reservation aforesaid.

208 *Testimony.*

Mr. Rault: I agree to the taking of the testimony of the master by consent at the offices of Messrs. Monroe & Lemann on Saturday, April 11, 1942, and agree to waiving, signing, sealing, certification and filing and all the other formalities provided by the de bene esse statute. I, however, do not agree to any reservation or attempted reservation as to the plea of sovereign immunity or any other plea that may in fact be waived by the taking of the testimony of the master.

STIPULATION.

209 Subject to the reservation and the exception to the reservation, it is stipulated that the testimony might be used in court in the above case.

It is further stipulated and agreed that the deposition of the Captain may be used in the present case or any future suit commenced by Galban Lobo Co. based upon or growing out of the failure of the Steamship Ucayali to proceed to New York on the voyage which is the subject of the present controversy, or any suit growing out of the condition of the cargo on that voyage.

It is further stipulated that all objections are reserved for the trial, except as to the form of the questions.

210 FRANCISCO OLSEN, being first duly sworn as a witness by Ferdinand E. Zimmer, Notary Public, testified as follows:

DIRECT EXAMINATION.

Mr. Callan:

Q. Captain, you are the master of the Steamship Ucayali? A. Yes, sir.

Mr. Rault: I wish to say, on behalf of libelants, that we shall take the position that the testimony of the Captain of the Ucayali and the appearance of counsel is a general appearance and waiver of any plea of sovereign immunity, or any plea connected therewith.

Mr. Callan:

Q. Captain, how long have you been master of the Ucayali? A. This is the second time that I have been master of the Ucayali, since the 28th of November last year.

Q. By whom were you employed as master of the Ucayali? A. The Peruvian Steamship Company.

Q. What is the name of the Peruvian Steamship Company? A. Compania Peruana De Vapores y Dique Del Callo.

Q. What was the relationship of that company to the Steamship Ucayali? A. They are the charterers of the ship—not the charterer, but they are running the ship. 212

Q. Do they own the ship? A. No, no; the ship belongs to the Peruvian Government.

Mr. Rault: I object. The question of ownership is a technical question and cannot be proved through the testimony of the master.

Mr. Callan:

Q. When did the vessel arrive in the City of New Orleans, Captain? A. The 23rd of March, 1942. 213

Q. When and from what point did the voyage, which ended in New Orleans on March 23, 1942, begin? A. When we left the last port.

Q. When did the voyage begin? A. The voyage began in Callao.

Q. On what date? A. The 28th of February, 1942.

Q. To what point did you proceed from Callao? A. To Samanco.

Q. What did you do at Samanco? A. We started loading sugar there.

Q. Do you know the name of the shipper of the sugar at that point? A. Well, at that point, it was Sociedad Agricola Hepena.

214 *Testimony.*

Q. To what port did you proceed from Samanco? A. From Samanco we proceeded to Eten.

Q. When did you arrive at that port? A. The 5th of March, I believe. (Witness refers to log book.) I can't have all the dates in my mind. We arrived at Eten the 4th of March.

Q. And what did you do at Eten? A. Load sugar, too.

Q. Who was the shipper of the sugar at Eten? A. Enrique Pardo.

Q. To what port did you proceed from Eten? A. To
215 Pimentel.

Q. When did you arrive at Pimentel? A. We arrived at Pimentel on the 5th of March.

Q. What did you do at that port? A. At Pimentel, load sugar, too.

Q. Who was the shipper of the sugar at Pimentel? A. Viuda de Piedra e hijos. All this shipment was supposed to go by Mr. Pardo from Samanco to Pimentel.

Q. Who was Mr. Pardo? A. He was the charterer of the ship; he is one of the parties of the charter.

Q. He was a party to the charter party? A. Yes, sir.

Q. When you left Pimentel, to what port did you proceed? A. Palara.

216 Q. When did you arrive at Palara? A. On the 7th of March.

Q. What did you do at that port? A. Bunkers, only bunkers.

Q. When did you leave that port? A. The same day, the 7th.

Q. To what port did you proceed after leaving Palara? A. We proceeded to Balboa.

Q. When did you arrive at Balboa? A. The 11th of March in the afternoon.

Q. When you arrived at Balboa, what did you do? A. Well, we was going to wait at Balboa. Hearing the news from the radio every day, we heard that many neutral ships

were being sunk in the North Atlantic, so we had a meeting on board and we decided to not go to New York on account of the risk.

Q. Now, you say that you heard that many ships had been sunk? A. Yes, there was a Chilean ship, the Tolten, that was sunk in the North Atlantic, and there was a Uruguayan ship and four Brazilian ships sunk.

Q. What was the source of this news, Captain? A. By the radio from New York.

Q. And with reference to your arrival at Balboa, could you fix the time that you heard this information or received this information by radio? 218 A. No, because we got the news at different times of the day or night.

Q. It was between the port of Palara and Balboa? A. Yes, sir.

Q. Now, when you refer to the sinking of neutral vessels, you are referring to what method of sinking? A. How is that, sir?

Q. What method of sinking were you referring to? A. Sinking.

Q. What method of sinking? Storms? A. No, no; submarines.

Q. Did you receive any additional information at Balboa with reference to the sinkings in the North Atlantic? 219 A. Well, the only thing we got there was from the newspapers that we got at Panama, that we got on board from the pilot and from the quarantine officers. They always used to bring papers on board.

Q. When was the meeting held that you have referred to, between yourself and your crew? Can you fix the date that that meeting was held? A. On the 12th, on the next day after we arrived there.

Q. That was the day after you arrived at Balboa? A. Yes; we arrived too late that day and the ship wasn't received by the authorities. We got there at seven o'clock at night, and on the next day we had the meeting.

220 *Testimony.*

Q. Approximately what time did you have the meeting? A. About noon.

Q. What else did you do after you held this meeting—or what did you do after you held this meeting? A. After we held the meeting?

Q. Yes. A. Well, I sent a cable to Callao, to the Government.

Q. By whom was the cable sent? Who actually sent the cable? A. Our agents.

Q. Who were your agents there? A. Panama Railroad
221 Company.

Q. Who else did you see at Balboa? A. At Balboa we see the Peruvian Consul.

Q. What did you see the Peruvian Consul for? A. Because we tell him we are agreed not to go to New York, I mean the officers and the crew, because we don't consider it safe to go on account of the sinkings.

Q. What was the cable that you sent to your owners? Can you tell us what your instructions were in that cable?

Mr. Rault: I object and ask for the production of the cable, or a copy of it.

222 Mr. Callan:

Q. You said that you asked your agents to send a cable to the Peruvian Government; is that right? A. Yes, sir.

Q. Have you a copy of that cable? A. No, I just tell my agent—the employee of the agent.

Q. What did you tell the employee of your agent? A. To let the Government know that the crew and the officers had agreed not to go to New York on account of the sinking of ships by subarines in the North Atlantic, and then he told me that the best thing is to see the Peruvian Consul, so I think the Peruvian Consul sent a cable.

Q. Was a reply received to that cable? A. By the Consul, yes, sir.

223

Q. Were you instructed with reference to the reply to that cable? A. Yes, they told me to proceed to New Orleans instead of to New York.

Q. You say "they" told you to proceed to New Orleans instead of New York. Who do you mean by "they?" A. The Peruvian Government.

Mr. Rault: I object and call for the production of the cable.

Mr. Callan:

224

Q. Who advised you that the Peruvian Government so instructed you? A. The Peruvian Consul and the agents, too.

Q. Did they give you any detailed instructions as to the manner and method in which you would proceed? A. The Peruvian Consul told me that I must go to the Fifteenth Naval District at Cristobal and get instructions there to have a safe route to New Orleans, and I went there and I got instructions from the commander-in-chief there, in the Fifteenth Naval District.

Mr. Rault:

225

Q. You mean directions? A. Yes, a sailing route.

Q. Sailing directions? A. Sailing directions, yes.

Mr. Callan:

Q. Now, after you got those directions, what did you do? A. We passed through the Canal the same day, the 15th, in the morning, and arrived at Cristobal the same day in the afternoon, and sailed from Cristobal on the 16th in the morning.

Q. What date did you leave Balboa? A. The 15th.

226 *Testimony.*

Q. When did you arrive at Cristobal? A. The same day in the afternoon.

Q. And when did you leave Cristobal? A. The next day, the 16th, in the morning.

Q. You referred to a charter party signed by Pardo? A. Yes, sir.

Q. Did you retain a copy of that charter party on the vessel? A. Yes, sir.

Q. Have you got that copy? A. I got the ship's copy (handing document to counsel).

227 Q. You have handed me a document in Spanish, purporting to bear the signature of Enrique Pardo. Is that his signature? A. That is his signature, yes, sir.

Q. That is the ship's copy of the charter party? A. Yes, sir.

Mr. Callan: We offer in evidence the charter party referred to by the master, marking the same Peru-1.

Mr. Rault: It is stipulated that a photostatic copy may be substituted for the original exhibit.

Mr. Callan:

228

Q. Now, Captain, how were the bills of lading that were issued on the sugar shipped at the various Peruvian ports made up, with reference to the numbers of bills of lading which were issued? A. They used to make ten copies.

Q. What was done with the ten copies? A. We used to sign three original bills, and we kept on the ship two, and the rest were given to the shippers. We don't know what they do with the rest.

Q. Now, what did you do with the copies that you kept on the ship? A. I have one set here and I give one set to the agent.

Q. There is exhibited to you five bills of lading which are marked for identification Peru-2, Peru-3, Peru-4, Peru-

229

5, Peru-6, and I ask you if these were bills of lading which you kept on board the vessel covering the shipment of the cargo which is in controversy here? A. Yes, sir.

Q. It is noted that all bills of lading bear the initials "H. V." Please state whose initials those are. A. The purser of the ship, H. Voysest.

Q. It is also noted that on the bills of lading, following the designation "Shippers," there is a name. What name is that? A. This name is the employee of the agents there.

Q. What agency are you referring to? A. Sociedad Agricola Hepena in that port, Samanco, and Pardo in Eten, and Viuda de Piedra e hijos in Pimentel.

230

Q. Those were the names of the shippers; is that right, Captain? A. Yes, sir.

Q. And the signature is the signature of the employees of the ship? A. Yes, sir, of the employees.

Mr. Callan: In connection with the witness' testimony, there is offered and introduced in evidence the bills of lading referred to and identified by him.

Cross Examination by Mr. Rault:

231

Q. Captain, when did you join this ship? A. The 28th, of November, 1941, for the second time.

Q. And from the 28th of November down to the present time, you have been continuously master of the Peruvian steamship Ucayali? A. Yes, sir.

Q. I show you Exhibit Peru-1, which is the ship's copy of the charter party and is written in Spanish. What is the date of that charter party? A. The 18th of November, 1941.

Q. That charter party was then signed before you became master of the ship? A. Yes, sir.

Q. Do you know Mr. Enrique Pardo? A. Yes, sir, I know him personally.

Q. He lives where? A. In Lima, Peru.

232 *Testimony.*

Q. Do you know that he is the agent of Galban Lobo Company? A. No, I don't know his relations.

Q. Do you know that he represents them there in Lima? A. Mr. Pardo?

Q. Yes. A. I only know him, sir.

Q. Have you any knowledge of the fact that he signed this charter party on behalf of Galban Lobo Company? A. No.

Q. You don't know anything about that? A. No, sir.

Q. You didn't see it signed? A. No, sir.

233 Q. Your only knowledge is that the ship's representatives gave you this copy? A. Yes, sir.

Q. And said to you that this was your charter party? A. Yes, sir.

Q. And that's all you know about it? A. That's all, and that I must load my cargo in those ports (pointing to charter party).

Q. You refer to the names of some ports written in pen and ink at the top of the charter party? A. Yes, sir.

Q. At Callao, did you load any sugar? A. No, sir.

Q. What did you load? A. Flax.

Q. Not under that charter party? A. No.

Q. Where was that flax bound for? A. New York, too.

234 Q. What was the first port at which you loaded sugar? A. Samanco.

Q. I show you the two bills of lading in Spanish, Peru-5 and Peru-4; are those your ship's copies of the bills of lading covering sugar loaded at Samanco? A. Yes, sir.

Q. There is no notation of short shipment on bill of lading Peru-5, is there? A. No.

Q. And on bill of lading Peru-4, there is a notation of short shipment of 157 sacks of sugar? A. Yes, sir.

Q. Your next port for loading was Eten? A. Yes, sir.

Q. And you have produced ship's copy of two bills of lading for that port, Peru-3 and Peru-2? A. Yes, sir.

235

Q. And your last port for loading sugar was Pimentel, wasn't it? A. Yes, sir.

Q. And you have produced the ship's copy of bill of lading marked Peru-6, which covers the Peru loading. Now, that shows eight bags short shipped and four bags lost over-board? A. Yes, sir.

Q. And in the cases of those short shipments, in order to know the amounts loaded at that port, you have to deduct that from the total amount shown in the bills of lading? A. Yes, sir.

Q. And I think you said that you understood that Mr. Pardo was loading this sugar at all of those ports? A. Yes, sir.

236

Q. Now, have you your log book here? A. Yes, sir.

Q. Is it written in English or Spanish? A. Spanish.

Q. Please turn to the entry showing the departure from Pimentel. A. Here it is, 6th of March.

Q. Please tell us the date and hour that you completed loading. A. At 4:00 o'clock P. M. on the 6th of March.

Q. And the date and hour that you sailed from Pimentel? A. 4:45 P. M. the same day, March 6th.

Q. Your next port was then going to be Talara? A. Yes, for bunkers.

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Q. When did you arrive at Talara, and when did you sail? A. On the 7th.

Q. At what hour? A. 1:20 P. M. on March 7th, arrived.

Q. And sailed when? A. 5:25 P. M. on March 7th.

Q. Then you had finished all loading and bunkering, and, when you left Talara, you were bound for New York via the Panama Canal? A. Yes, sir.

Q. That's correct? A. Yes, sir.

Q. Now, tell me the date and hour that you arrived at Balboa? A. We arrived on the 11th of March at 7:08 P. M.

Q. What did you do? Anchor? A. Anchored outside.

Q. When did the American officers or port authorities come aboard? A. On the 12th at 9:20 A. M.

238 *Testimony.*

Q. While you were still at anchor? A. Yes, sir.

Q. When was this meeting that you refer to held? A. On the 12th about noon.

Q. Please read to me all of the entries in your log book, beginning at 6:20 P. M. on March 11th. A. "March 11, 18:29, log taken on board, showing in the log 788.5 miles. 18:31, orders to stand by the engines. 18:33, full speed astern. 18:35, full speed ahead. 18:55, stopped. 19:00, full speed astern. 19:01, slow ahead. 19:05, full speed astern. 19:08, anchored at nine fathoms with 45 fathoms of chain. 19:11, finished with engines."

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Q. Then, you had anchored and finished with the engines at eleven minutes after seven o'clock on the night of March 11th? A. Yes, anchored in the Bay of Balboa.

Q. Your log as translated by you shows that the authorities came on board at 9:20 A. M.? A. Yes, sir.

Q. And the line with 12 noon is the record indicating that the customs and port authorities formalities had been completed? A. Yes, sir.

Q. The next entry is at 1:00 o'clock, indicating that you are waiting to go alongside the pier at Balboa? A. At Balboa, yes.

Q. There is a similar entry between 4:00 and 8:00 P. M.

240 on March 12th? A. Yes, sir.

Q. And the only entry between 8:00 to 12:00 P. M. on March 12th is that you anchored in the Bay? A. Yes, sir.

Q. And on March 13th, between midnight and 4:00 o'clock, you have the entry "Anchored in the Bay?" A. Yes, sir.

Q. At 12:42 P. M. on March 13th, you have an entry that the pilot came on board, and you began heaving up anchor? A. Yes, sir.

Q. And then at 2:35 P. M. you have the entry "alongside the pier at Balboa?" A. Yes, sir.

Q. Captain, I see no entry in there about this meeting that you held on board. A. Well, we didn't put it, because,

we received orders from the Government afterwards, so I didn't put anything in the log book.

Q. Who attended that meeting on board ship? A. I attended the meeting.

Q. Who else? A. The chief officer, the second officer, the chief engineer and the purser.

Q. That meeting was held on what day? A. On the 12th.

Q. About noon? A. About noon, yes.

Q. That was while you were at anchor? A. Outside in the Bay.

Q Had you gotten any newspapers by that time? A. 242
Yes, sir.

Q. From whom? A. From the port authorities, the doctor there from the custom-house.

Q. And it was then that you, the chief officer, the second officer, the chief engineer and the purser decided that you would not go to New York because it was too dangerous on account of the radio news and the newspaper news that you had received with respect to the torpedoing and sinking of neutral vessels; is that correct? A. Yes, sir.

Q. You sent no wireless to your owner? A. No, sir.

Q. You simply decided not to go? A. Not to go.

Q. Did you decide what you were going to do, since you were not going to New York? A. No, sir. 243

Q. But you had definitely made up your minds that under no circumstances were [redacted] going to go up the North Atlantic Coast? A. Yes, sir.

Q. And then you went ashore at Balboa? A. At Balboa, yes.

Q. And you say you saw your ship's Agent? A. And the Peruvian Consul.

Q. But first the ship's agent? A. They met me on the ship, outside in the Bay.

Q. Were they present at this conference? A. No, sir.

Q. You told them, when you met them, of the decision that you and your officers had reached? A. About not going to New York.

244 Q. You told them you were not going? A. Yes, sir.

Q. And that was definite? A. Yes, sir.

Q. And they said what? That they would tell Peru of your decision? A. Of my decision, yes.

Q. And you say you did not see the cable that was sent by your ship's agent at Balboa? A. No, sir.

Q. Do you know who they sent it to? A. I think the Consul, the Peruvian Consul.

Q. Who was your ship's agent at Balboa? A. Panama Railroad Company.

245 Q. The Compania Peruana De Vapores y Dique Del Callo, is that the Company for whom the Panama Railroad Company was acting? A. Yes, sir.

Q. Is that the Company to which the Panama Railroad Company sent the cable? A. Yes, sir.

Q. Did you ever see that cable? A. No, sir.

Q. Then, the Peruvian Consul at Balboa told you that he had cabled to his government in Peru of your decision? A. Of our decision, yes, sir.

Q. And you did not see that cable either? A. No, sir.

Q. On what date was it that you got word to go to New Orleans? A. The 14th, in the night.

Q. The 14th of March? A. Yes, sir.

246 Q. Had you had any advices from your ship's agent at Balboa, or from the Consul in the meantime? A. No, sir.

Q. You were just waiting to hear— A. Waiting.

Q. As I understand, Captain, you were just waiting to hear what your ship's representatives and the Peruvian Government had to say when they learned of your decision that you would not go to New York? A. Yes, sir.

Q. Is there an entry in the log book with respect to the answer that your ship's agent or the Peruvian Consul gave you? A. No, sir.

Q. Did they give you any written orders to go to New Orleans? A. No, they told me by word only that I must go to New Orleans.

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Q. Who told you that? The Panama Railroad Company representatives? A. First the Consul.

Q. What was his name? A. Pinedo.

Q. He is the Peruvian Consul at Balboa? A. In the Canal Zone.

Q. And he gave you verbal instructions to go to New Orleans? A. To New Orleans, and to take instructions from the Fifteenth Naval District.

Q. And to take sailing directions from the American Naval District authorities at the Canal Zone? A. Yes, sir.

Q. And then your ship's agent simply said that he had similar word? A. Similar word.

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Q. From the ship's representatives in Peru? A. Yes, sir.

Q. And he gave you nothing in writing? A. No, sir.

Q. What was the name of the representative of the Panama Railroad Company with whom you dealt? A. I can't remember his name.

Q. He was an American? A. Yes, he was American.

Q. Did he speak Spanish? A. No. Every time I would find new employees, and I can't remember the names.

Q. Then you passed through the Panama Canal? A. Yes, in the morning of the 15th.

Q. And where did you get on the night of the 15th? 249
Cristobal? A. Cristobal.

Q. Did you anchor there? A. Yes, sir.

Q. That is on the Atlantic side of the Panama Canal? A. Yes, sir.

Q. Then you left your anchorage at Cristobal on the 16th at what time? A. 8:18 A. M.

Q. When did you get clear for sea? A. At 9:25 A. M.

Q. On March 16, 1942, you took your departure from Cristobal bound for New Orleans? A. Yes, sir.

Q. Do I understand Captain, that at no time from March 12th at noon, when you and your officers made the decision that you would not go to New York, until the

250 time you arrived at New Orleans, did you receive any written instructions or telegraphic or cable or wireless instructions from your ship's representatives about going to New Orleans; is that right? A. Yes, that's right.

Q. The only thing that you got were these verbal messages that you have referred to, from the Peruvian Consul at the Canal Zone and from the Panama Railroad Company, your agents in the Canal Zone? A. Yes, sir.

Q. Which they said were the replies of the ship's representatives in Peru to your statement that you would not go to New York? A. To New York, yes.

251 Q. That's right, is it? A. Yes, sir.

Q. This Compania Peruana De Vapores y Dique del Callo, they were the ones who paid you? A. Yes, sir.

Q. And paid your crew? A. Yes, sir.

Q. Furnished you with supplies? A. Yes, sir.

Q. Furnished you with bunkers? A. Yes, sir.

Q. Gave you your orders at Peru? A. Yes, sir.

Q. And at the various loading ports and at the bunkering port in Peru? A. Yes, sir.

Q. In short, the Compania Peruana De Vapores y Dique Del Callo acted in all respects as your owner? A. Yes.

Q. And as owner of the vessel? A. No, the owner of
252 the vessel was the Peruvian Government.

Q. I say, they acted in all respects as the owner of the vessel; is that right? A. Yes, sir.

Q. They are the signators to the ship's copy of the charter party that you have presented? A. Yes, sir.

Q. And their name appears on all of the bills of lading, ship's copies of which you have produced here? A. Yes, sir.

Q. And they made, according to the charter party, the contract of charter for the ship? A. Yes, sir.

Q. None of the freight money was paid to you, was it? A. No, sir.

Q. Do you know that that freight money was paid—

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that is, the part that was paid in Peru,—was paid to the Compania Peruana De Vapores y Dique Del Callo? A. Yes.

Q. You know that? A. Yes, sir.

Q. By Pardo? A. Yes, sir, by Enrique Pardo.

Q. The sailing directions that you have referred to as being received from the United States Naval authorities in the Canal Zone were merely telling you how to get from the Canal Zone to New Orleans? A. Yes.

Q. On account of war conditions? A. Yes, sir.

Q. About mines and what not of that sort? A. Yes.

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Q. Were you master of this ship prior to November 28, 1941, at any time when it was operated under a charter between the Compania Peruana De Vapores y Dique Del Callo and Enrique Pardo? A. I was captain of the ship in July, 1940, when the ship was chartered by Mr. Echecopa. He chartered the ship, and he was working with Mr. Enrique Pardo.

Q. Your understanding was that Mr. Pardo was interested in the charter of the ship at that time? A. Yes, sir.

Q. That trip was from where to where? A. From Callao to New York.

Q. With sugar? A. Yes, sir.

255

Q. Did you know or did you hear that Galban Lobo Company were the principals for whom Mr. Pardo and Mr. Echecopa were acting? A. No, sir.

Q. Your statement is that, so far as you personally were concerned, you don't know anything about Galban Lobo Company in this transaction? A. No, sir.

Q. Then, Captain, in due course you arrived at New Orleans on March 23rd, and have here discharged all of the sugar that was on board, which had been originally consigned to New York? A. Yes, sir.

Q. Captain, were some of these bags of sugar damaged? A. If I know that?

Q. Were they damaged when you arrived here? A. Yes, sir.

256 *Testimony.*

Q. What was the cause of the damage? A. The cause of the damage was on account of two days of heavy strong wind we had in the Gulf, where the ship was taking too much water on the forward deck.

Q. What happened? A. I think one or two rivets became loose, and it was leaking the water through there.

Q. Where were the rivets? A. On the main deck.

Q. What date was that?

(Witness refers to log book.)

A. The 21st of March.

257 Q. Into what hold did this sea water get? A. No. 2 hold.

Q. How many bags were damaged? A. Approximately about sixteen or eighteen bags.

Q. Of refined sugar? A. Yes, sir, refined sugar.

Mr. Rault: I serve notice we shall amend our libel and add to it claim for cargo damage.

Q. What was the weather on March 21st? A. Well, it was a strong wind, Force 7.

Q. Read the log entry to me about the weather on that day. A. "Strong wind, heavy sea on account of the wind,

258 the ship taking water in the fore part." That was since 18:00 that day.

Q. On March 21st? A. Yes, sir.

Q. To when? A. Until 13:00 of the 22nd.

Q. And the wind forces, beginning on 17:00 of the 21st, as shown in your log book, read as follows:

"March 21, 17:00, force 4, northwest.
18:00, force 7, northwest.
19:00, force 7, northwest.
20:00, force 7, north.
21:00, force 7, north.
22:00, force 7, north.
23:00, force 7, north.
24:00 (or midnight), force 7, north.

259

March 22, Force 7, north, continuously from
1:00 A. M. until 7 A. M.
8:00 A. M. force 6 north.
Then force 6 until 13:00.
Then force 5, force 4 and force 3,
down to 16:00?

A. Yes, sir.

Q. Always from the north? A. Yes, sir.

Q. What was your noon position on March 21st? A. 26:4 north latitude, 85:2 west longitude.

Q. What was your noon position on March 22nd? A. 28:17 north latitude, 89:21 west longitude.

260

Q. Where were these rivets that got loose, Captain? A. On the port side of the main deck, in the fore part, in front of No. 2 hatch.

Q. In the deck itself? A. Yes, sir.

Q. What did you do to prevent the water from going in? A. We put some cement up—well, during the bad weather we couldn't do anything.

Q. And after the bad weather, as you call it, was over, you put some cement on the loose rivets? A. Yes, sir.

Q. How many rivets were loose? A. Two.

Q. Did your bilge soundings increase in that hold? A. No, sir.

261

Q. The sugar absorbed the water? A. Yes, sir.

Q. Captain, were any bags cut when you discharged? A. Well, when they were working discharging the cargo, four or five sacks were cut.

Q. Is it not a fact that 200 or 300 bags were found to be cut by having rested on metal surfaces and edges in your holds? A. I haven't seen that.

Q. What dunnage did you have in the holds? A. What quantity, you mean?

Q. No, what kind? A. Wood.

Q. Did you have any other dunnage besides wood? A. No, sir.

262 Q. No paper? A. No, sir.

Q. No mats? A. No, sir.

Q. You had no covering, then, on your cross beams and angles? A. No, only wood.

Q. Did you have wood on these beams? A. Yes.

Q. Did you see it yourself? A. Yes, yes.

Q. What were they—just strips of wood? A. Yes, strips of wood.

Q. Were they tied on, or how were they made fast? A. Tied on with a piece of rope.

263 Q. The refined sugar consisted of about 27,000 bags, more or less, did it not? A. I can't remember. I will have to refer to the bill of lading.

Q. These were in white bags? A. No, not all of them; about 7000 was in big sacks, in big bags.

Q. White cotton bagging? A. White, only 20,000 sacks.

Q. You had 20,000 sacks in white cotton bags? A. Yes, sir.

Q. Were not those bags very dirty when the vessel arrived in New Orleans? A. No, they were clean.

Q. Did you not see that the bags were damaged in loading? A. No.

264 Q. Or soiled in loading? You know what I mean by soiled? A. Yes.

Q. Made dirty? A. No.

Q. Did not the stevedores at the loading port walk on these bags? A. They walked, yes, but without shoes.

Q. Did they not make the bags very dirty in walking over them? A. No, sir.

Q. That's all.

Re-direct Examination by Mr. Callan:

Q. Captain, you are a citizen of Peru, are you not? A. Yes, sir, I am a Peruvian.

Q. How long have you been a master? A. For about ten years.

265

Q. When did you obtain your license, what year? A. In 1925.

Q. That is an unlimited license? A. Yes, sir, unlimited.

Q. How long have you been going to sea? A. Since 1917, sir.

Q. Will you give me the dimensions of the Ucayali? A. Well, the Ucayali is 312 feet length over all.

Q. And how much tonnage, gross and net?

(Witness examines charter party.)

266

A. Only the net tonnage is shown, and that is 1700 registered tons.

Q. What is the speed of your vessel, Captain? A. Nine knots.

Q. What is the age of the vessel, if you know? A. She was built in 1917.

Mr. Rault:

Q. You fly the Peruvian flag, Captain? A. Yes, sir.

Q. And are all of your officers Peruvians? A. All Peruvians.

267

Q. Are you a native born citizen of Peru? A. I was born in Peru, yes, sir.

Q. How many men were in your crew? A. Forty-three with me.

Q. The Campania Peruana De Vapores y Dique Del Callao gave you your orders originally to proceed to New York? A. Yes, sir.

Q. Where was the vessel last dry docked? A. It is in the log book because it was just this trip. (Witness examines log book.) We left the dry dock on February 26, 1942, two days before we sailed?

Q. Where? A. Callao.

Q. Captain, when you were master of this ship in 1940,

268 *Testimony.*

the Compania Peruana De Vapores y Dique Del Callo was acting as owner then? A. Yes, sir.

Q. And during the whole time of your employment on board the ship, on both occasions, the Compania Peruana De Vapores y Dique Del Callo acted as owner? A. Yes, sir.

Q. They gave you orders and paid you and paid your crew? A. Yes, sir.

Q. And furnished the ship's supplies? A. Yes, sir.

Q. Issued bills of lading? A. Yes, sir.

Q. And signed charter parties? A. Yes, sir.

269 Q. Captain, when do you leave here? A. Perhaps tomorrow.

Q. That would be Sunday, April 12, 1942? A. Yes, sir.

Q. Where are you bound for? A. Cristobal.

Q. And then? A. To Peru.

Q. Your agents here are Page, Lhote & Company? A. Yes, sir.

Q. They are agents for the Compania Peruana De Vapores y Dique Del Callao? A. Yes, sir.

Q. And you have received your orders to proceed via the Panama Canal to Peru from Compania Peruana De Vapores y Dique Del Callo? A. Yes, sir.

270 Q. Have you had any advices, since you have arrived at New Orleans—any written advices—about not proceeding to New York? A. No, sir.

Q. In short, up to the present moment when you are testifying, you have had nothing except the verbal statement made to you by the Panama Railroad Company's man and the Peruvian Consul at Balboa? A. Yes, sir.

Q. No writing? A. No.

Q. No cable? A. No.

Q. No letters? A. No.

Q. Nothing? A. Nothing.

Q. Neither from the Compania Peruana De Vapores y Dique Del Callo or from her agents here, Page-Lhote & Company? A. No, sir.

271

Mr. Callan:

Q. You were advised, Captain, however, that the agents and the Peruvian Consul had something in writing, were you not? A. Sir?

Q. You were advised that your agents at Balboa and the Peruvian Consul had instructions in writing? A. Yes, sir.

Q. But those written instructions were not handed to you; is that right? A. Yes, sir, that's right.

Q. That's all.

272

Mr. Rault: That's all.

I hereby certify that the foregoing forty pages contain a true and correct transcript of the testimony of Francisco Olsen, as reported and transcribed by me:

(Signed) FERDINAND E. ZIMMER,
FERDINAND E. ZIMMER,
Notary Public.

(Seal)

273

274 **Opinion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A.

versus

COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO

275 and

The Steamship "UCAYALI," her engines, boilers, etc.

No. 562
In Admiralty

TERRIBERRY, YOUNG, RAULT AND CARROLL, Attorneys for Plaintiff.

MONROE AND LEMANN, NICHOLAS CALLAN, Attorneys for Defendant.

276 BORAH, District Judge:

The question here is whether or not the respondent and claimant has entered a general appearance, and submitted itself to the jurisdiction of the court, thereby waiving any right to maintain a plea of sovereign immunity.

The following is a statement of the proceedings in the order in which they occurred.

On March 30, 1942 the present libel in rem was filed by libellant against the steamship UCAYALI seeking to recover losses and damages growing out of a breach of a contract of carriage between libellant's agent at Calloa, Peru, and Compania Peruana de Vapores y Dique del Callao, alleged on information and belief to be the owner of the Steamship

UCAYALI. On the same day admiralty process in rem was issued by the Clerk and on the day following the United States Marshal executed the warrant of arrest and from that day until released on bond the vessel remained under seizure in the custody of the United States Marshal.

In order to relieve proctors representing the vessel from the burden of applying and obtaining an order of court fixing the amount of the bond, proctors for the libellant did, on April 1, 1942, in accordance with usual practice, address a letter to the United States Marshal advising him "that the libellant is agreeable to having the S.S. UCAYALI 278 released from seizure upon the posting of a surety release bond in the sum of $60,000.00". The original of this letter was delivered to proctors for the UCAYALI.

On April 9, 1942, a sworn claim for the UCAYALI was filed by the Republic of Peru, in which it alleged itself to be "* * * the true and bona fide sole owner of the said S.S. UCAYALI * * *; wherefore it prays to defend accordingly. The filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant particularly but not exclusively sovereign immunity."

On the same day a surety release bond, dated April 9th, 279 in the amount of $60,000.00, whereon the Republic of Peru was principal, and the National Surety Company was surety, was filed for the release of the UCAYALI. This bond though containing a reservation identical with that contained in the claim was otherwise in the usual form, the condition of the bond being

> "that if said claimant and surety abide by all the orders interlocutory or final of the court and pay the libelant the amount awarded by final decree rendered in the court to which the process is returnable, or in any appellate court, then the foregoing obligation is to be voided, but otherwise it will remain in full force and effect."

280 This bond contained a recital that the admiralty warrant had been issued by way of foreign attachment and upon discovery of the error was amended by striking out the words "by process of foreign attachment" and substituting therefor the words "by process in rem".

On April 11, 1942, in accordance with the desire theretofore expressed by proctors for the Republic of Peru, the testimony of Francisco Olsen, master of the UCAYALI, was taken on the merits of the case. Before swearing the witness, the following was dictated into the record by proctor
281 for respondent.

> "The testimony of Francisco Olsen, the master of the Peruvian Steamship Ucayali, is taken with full reservation and without waiver of all defenses and objections which may be available to respondent and claimant, particularly but not exclusively sovereign immunity; and the appearance of counsel for the Government of Peru and the Steamship Ucayali is for the special purpose only of taking the testimony of the master under the reservation aforesaid."

282 To which proctor for libellant replied:

> "I agree to the taking of the testimony of the Master by consent at the offices of Messrs. Monroe & Lemann on Saturday, April, 11, 1942, and agree to waiving, signing, sealing, certification and filing and all the other formalities provided by the de bene esse statute. I, however, do not agree to any reservation or attempted reservation as to the plea of sovereign immunity or any other plea that may in fact be waived by the taking of the testimony of the master."

After the witness was sworn and began his testimony, proctor for libellant made the following statement:

> "I wish to say, on behalf of libelants, that we shall take the position that the testimony of the Captain of the Ucayali and the appearance of counsel is a general appearance and waiver of any plea of sovereign immunity, or any plea connected therewith."

In the direct examination which followed many facts were brought out dealing with the merits of the litigation and through this witness Peru exhibits 1 to 6, inclusive 284 (being charter party on which this libel is based and bills of lading) were offered in evidence. None of these documents contain any reference to the alleged ownership and possession of the Republic of Peru.

On April 18, 1940, prior to the expiration of the return day, the respondent, through its proctors, on ex parte motion obtained the following order from the court:

> "On motion of Republic of Peru, respondent and claimant, through its proctors, Monroe & Lemann, who appear herein for the special and limited purpose of presenting this motion and with full reservation 285 and without waiver of any defenses and objection which may be available to mover, particularly but not exclusively, sovereign immunity, and on suggestion to the Court that the return day to answer or otherwise plead to the libel herein expires on April 20th, and on further suggesting to the Court that mover requires an extension of at least twenty (20) days to present fully and adequately its pleas and defenses to said libel, particularly, but not exclusively, the defense of sovereign immunity;
>
> It Is Ordered that the time to answer or otherwise plead to the libel filed herein be and the same is

286 hereby extended for a period of twenty (20) days from April 20th, 1942.

New Orleans, La. April 18, 1942.

(Signed) A. J. CAILLOUET
Judge."

Similar motions, orders and extensions were granted on May 8th and May 29th, 1942.

The suggestion of immunity and motion to dismiss was filed by the United States Attorney on June 29, 1942. A
287 similar motion to dismiss was also filed by the Republic of Peru on June 17, 1942.

The courts have uniformly held that a sovereign may waive its immunity and that it may do this by a general appearance, or by acts or conduct inconsistent with a special appearance entered solely for the purpose of raising a jurisdictional issue, if such acts or conduct spell out a general appearance. *Ervin* v. *Quintanilla* (5th Cir.) 99 F. (2d) 935; *The Sao Vicente,* (3rd Cir.) 295 Fed. 829; *Dexter & Carpenter* v. *Kunglig,* (2nd Cir.) 43 F. (2d) 705. If as libellant contends, the respondent claimant has entered a general appearance and submitted itself to the jurisdic-
288 tion of the court, there can be no later assertion of immunity and withdrawal, for as was said in *Puerto Rico* v. *Ramos,* 232 U. S. 627, 34 S. Ct. 461, 58 L. Ed. 763:

> "The immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step"

In determining whether there has been a general appearance or submission to the jurisdiction, the intent of the pleader is to be determined not by what he says but by the nature of what he does. As was said in *Murphy* v.

Herring-Hall-Marvin Safe Co., 184 Fed. 495, "the effect is not to be deduced from what the party may have intended, but from what he did. It is the act which speaks, and not the secret purpose."

Applying the law to the facts and assuming, though not deciding, that respondent's action in claiming and bonding the vessel should be regarded as a special appearance, there is seemingly no escape from the conclusion that respondent entered a general appearance by taking the testimony of the master for use on the trial of the cause on the merits. *George Nelson, Master of the Barge Northern No. 30,* v. 290
S. S. Munwood, and another case, 1925 A. M. C. 136. See also *Clark* v. *Southern Pacific Co.*, (5th Cir.) 175 Fed. 122; 6 C. J. S. p. 7; 4 C. J. pp. 1317, 1318, 1334. And I reach the same conclusion with respect to the ex parte motions for extensions of time within which to answer or otherwise plead, for what the respondent did in each instance was to request an extension of twenty days "to present fully and adequately, its pleas and defenses to said libel, particularly, but not exclusively, the defense of sovereign immunity."

If, as here, the appearance is in effect general, the fact that respondent claimant styles it a special appearance will not change its character. The courts have held that an 291
appearance for any purpose other than questioning the jurisdiction of the court is general and not special, although accompanied by the claim that the appearance is only special, and a defendant appearing specially must, as a general rule, keep out of the court for all other purposes.

The plea of sovereign immunity should be overruled and the sovereign must be held to have waived its immunity to suit, and claimant respondent should be required to answer the libel on the merits.

New Orleans, Louisiana, October 13th, 1942.

(Signed) WAYNE G. BORAH
Judge.

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Order.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
New Orleans Division.

GALBAN LOBO CO., S. A.

versus

COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO

and

293 The Steamship "UCAYALI," her engines, boilers, etc.

No. 562
In Admiralty

This cause came on to be heard on the suggestion and plea of immunity filed herein by the Republic of Peru and by the United States Attorney for the Eastern District of Louisiana, and on the motion to dismiss filed by the Republic of Peru, and on the return made to the suggestion and plea of immunity and to the motion to dismiss made by libelant, and on the affidavits annexed to these pleadings by the several parties;

294 And after hearing argument of counsel for the respective parties the matter was submitted on briefs filed by the respective parties, when the court took time to consider;

Thereupon, and upon due consideration thereof, and for the written reasons of the court on file herein;

It is ordered that the suggestion and plea of immunity filed herein by the Republic of Peru and by the United States Attorney for the Eastern District of Louisiana and the motion to dismiss filed by the Republic of Peru be and the same are hereby overruled and that the Republic of Peru, claimant-respondent herein, is held to have waived its immunity to suit herein and is required to answer the libel herein on the merits within 20 days.

New Orleans, Louisiana, October 16th, 1942.

Signed, A. J. Caillouet
UNITED STATES JUDGE

Motion for Rehearing. 295

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA,

New Orleans Division.

GALBAN LOBO CO., S. A. versus COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc.	No. 562 In Admiralty. 296

On motion of Republic of Peru, through its undersigned counsel and on suggesting to the Court that there is error in the opinion rendered in this cause on October 14th, 1942, overruling Mover's plea of sovereign immunity.

IT IS ORDERED that libelant's Galban Lobo Company, S. A., through its proctors of record, show cause on the 297 11th day of November, 1942, why a rehearing herein should not be granted.

Sgd. A. J. Caillouet
UNITED STATES JUDGE

Monroe & Lemann
Nicholas Callan

.....

Proctors for Republic of Peru
October 17, 1942.

298 **Minute Entry, November 18, 1942.**

Borah, j:

No. 562 (Admiralty)

GALBAN LOBO COMPANY, S. A.

versus

COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO and The Steamship "UCAYALI," her engines, boilers, etc.

This cause came on this day on motion of Claimant, Republic of Peru, for rehearing;

299 Present: Jos. Rault, (Terriberry, Young, Rault, & Carroll), Attorney for Plaintiff,
Nicholas Callan, (Monroe & Lemann) Attorney for Defendant,
L. V. Cooley, Jr., Assistant United States Attorney,

Whereupon, after hearing argument of counsel for the respective parties, IT IS ORDERED that said motion be, and the same is DENIED.

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Clerk's Certificate.

United States of America,
Eastern District of Louisiana, } ss.:

I, A. DALLAM O'BRIEN, JR., Clerk of the United States District Court in and for the Eastern District of Louisiana, do hereby certify that the annexed and foregoing is a true and full copy of the original record including all exhibits and testimony in the case entitled:

GALBAN LOBO CO., S. A.
vs.
COMPANIA PERUANA DE VAPORES Y DIQUE DEL CALLAO
and
The Steamship UCAYALI, Her Engines, Boilers, etc.

No. 562—ADMIRALTY DOCKET

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at New Orleans, La., this 2nd day of December, A. D. 1942.

A. DALLAM O'BRIEN, JR.,
Clerk.

By H. W. NIEHMS,
Deputy Clerk.

(Seal)

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IN THE

Supreme Court of the United States

..... TERM, 1943

No. 13 ..... Original

In the Matter

of the

Petition of the REPUBLIC OF PERU, owner of the Peruvian Steamship "UCAYALI," for a writ of prohibition and/or a writ of mandamus against the Honorable WAYNE G. BORAH, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the other judges and officers of said court.

BRIEF FOR THE REPUBLIC OF PERU

MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
Proctors for the Republic of Peru.

HERBERT M. STATT,
LINDSAY D. HOLMES,
of Counsel.

CORPORATE PRESS, INC., NEW YORK CITY

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BRIEF FOR THE REPUBLIC OF PERU

I.

Issues Presented.

This application presents the following basic questions:

1. Whether, even though, pursuant to the instructions of the Attorney General of the United States, the United States Attorney at New Orleans had presented to the Court the application for immunity of the Republic of Peru, recognized and approved by the Department of State in the following words:

> "The Department will appreciate it if you will instruct the United States District Attorney in New

> Orleans to present to the court the attached certified copy of the Ambassador's note and to say that this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali,* and recognizes and allows the claim of immunity"

the Republic of Peru, a friendly sovereign government, has waived its privilege and right to decline to submit to the jurisdiction of an American court upon the libel of a private corporate suitor, a national of the Republic of Cuba, by applying to the District Court in which it has been sued for an extension of time within which to present its pleas and defenses to the libel filed against it and particularly but not exclusively the defense of sovereign immunity (with full reservation and without waiver of any defenses and objections, particularly but not exclusively sovereign immunity).

2. Whether, in the above mentioned circumstances, by taking within the District within which suit was brought against it, the deposition of the master of its steamship *Ucayali,* the deposition being taken solely to perpetuate his testimony because of the prevalent war conditions and the fear that the witness might never again be available (with full reservation and without waiver of the right to plead sovereign immunity), the Republic of Peru, a friendly sovereign government, has waived its privilege and right to decline to submit to the jurisdiction of an American court upon the libel of a private corporate suitor, a national of the Republic of Cuba.

II.

History of Proceedings.

On or about the 18th day of November, 1941, the Republic of Peru, as owner of the Peruvian steamship *Ucayali,* through the interposition of its agent, Compania Peruana

de Vapores y Dique del Callao, agreed to let, and one Pardo, a Peruvian citizen, agreed to hire, the said steamship *Ucayali* for the transportation of a full cargo of sugar in bags from Peruvian ports to New York. Thereafter, the vessel loaded approximately 3,600 tons of sugar in bags, and on March 3, 4 and 6, 1941, issued bills of lading consigning said cargo for delivery to Order at the port of New York subject to all the terms, conditions and exceptions, including war clauses and clauses authorizing the said cargo to be discharged at other ports than the destination, in appropriate circumstances, contained in said bills of lading and in the charter party hereinbefore referred to.

Thereafter, the said vessel proceeded toward the port of New York in compliance with the terms of the aforesaid documents, but the master of the steamship *Ucayali* and her owner, the Republic of Peru, learning of the sinkings of both neutral and warring vessels by enemy Axis submarines on the route between the Panama Canal and New York, decided to and did proceed to the port of New Orleans for the safety of the vessel, the cargo and the lives of the crew. At that time many other vessels, including ships owned or controlled by the United States through the United States Maritime Commission and the War Shipping Administration, were being similarly diverted from North Atlantic into Gulf ports for the same reason.

Thereafter and during the course of the discharge of the steamship *Ucayali* at New Orleans, La., and on or about the 30th day of March, 1942, Galban Lobo Co., S. A., a corporation organized and existing under and by virtue of the laws of the Republic of Cuba, caused a libel to be filed in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division against Compania Peruana de Vapores y Dique del Callao, the agent of the steamship *Ucayali* for the Government of Peru, in personam, and against the steamship *Ucayali in rem*. The libel claimed to recover the sum of $100,000 by

reason of the discharge of the steamship *Ucayali* of her sugar cargo at the port of New Orleans instead of the port of New York. Thereafter, the Republic of Peru made immediate preparation to cause the dismissal of the libel and the release of its steamship *Ucayali* on the ground that the Republic of Peru was a friendly sovereign nation entitled to immunity from suit in the courts of the United States. The course of procedure necessary to effect this result as outlined by this Court in the case of *Ex Parte Muir*, 254 U. S. 522, *The Navemar*, 102 F. (2d) 444, and other cases cited *infra* Point III, required that appropriate instructions be given the Peruvian Ambassador by the Peruvian Government, that the Peruvian Ambassador make representations to our State Department, that the State Department advise the Attorney General of the claim of immunity, and that the Attorney General instruct the United States Attorney for the appropriate district to file the appropriate suggestion of immunity in the court proceedings. The necessity for communication between Peru and Washington to obtain instructions that the Peruvian Embassy at Washington make representations to the American Department of State, the necessity that the American Department of State make appropriate representations to the United States Attorney General, and for the latter in turn to instruct the United States Attorney for the Eastern District of Louisiana—consumed many days so that it became necessary to cause the release of the steamship *Ucayali* from the libel aforesaid so that the vessel might engage first in the transportation of materials and supplies for the United States Government, and thereafter to engage in her necessary business in behalf of the people of the Republic of Peru. Accordingly, on or about the 9th day of April, 1942, the master of the steamship *Ucayali* filed the claim of the Republic of Peru to the said vessel, the claim expressly reserving the privilege and right

of the Republic of Peru to cause the dismissal of the suit against its vessel on the ground of sovereign immunity. Bond in the sum of $60,000, as agreed upon between counsel for the Republic of Peru and for libelant in the said action, was thereupon likewise filed, containing the same reservation of the right to dismiss the libel on the ground of sovereign immunity, for the purpose of expediting the return of the vessel to useful service under the emergency which then existed and still continues.

Thereafter, and on or about April 11, 1942, proctors at New Orleans for the Republic of Peru, with proctors for libelant, under reservation by proctors for the Republic of Peru of its appearance as special only for the purpose of taking the testimony of the master as aforesaid and without waiver of its defense of the right to plead sovereign immunity, which reservation was not consented to by proctors for libelant, proceeded with the taking of the testimony of the master on the question of the reasons for and the conditions which necessitated the alteration of destination from New York to New Orleans. The deposition was taken at that time because the Republic of Peru considered it imperative to perpetuate the testimony of the master of its steamship *Ucayali*, as it was obvious that, under the general conditions of war which prevailed and with the destruction of vessels and consequent loss of life at its height as a result of the submarine menace, the master of the said vessel might never again be available for the purpose of giving his testimony if the case should ever reach that stage. In addition, the slow course of the necessary procedure for the formal presentation of the claim of the Republic of Peru to sovereign immunity made it impossible, in a practical sense, under the emergency conditions which then prevailed and under the universal need for ships and shipping space, to hold the vessel at New Orleans without perpetuating the testimony of the master

until the plea of immunity, originally and continuously reserved, could be presented with all the formalities.

Thereafter, the well-defined formalities prerequisite to the perfection of the plea of sovereign immunity in such cases still not being concluded because of the necessity for communications as above described and because of the delay of the United States Attorney for the Eastern District of Louisiana in receiving final authorization to proceed with the formal and orderly presentation of the plea, it became necessary to, and the Republic of Peru did, procure on April 18, May 8 and May 29, 1942, extensions of time within which to present adequately its pleas and defenses to the libel, particularly the defense of sovereign immunity. The appearances for the purpose of obtaining such extensions were specifically stated to be special and limited to the presentation of the motion for an extension and fully reserved the right of the Republic of Peru to plead sovereign immunity.

Thereafter and on or about the 7th and 29th days of June, 1942, the Republic of Peru, and Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, upon the letter of His Excellency M. de Freyre y Santander, Ambassador of the Republic of Peru to the United States, addressed to the Honorable Sumner Welles, Acting Secretary of State, upon the letter of the Honorable Sumner Welles to the Honorable Francis Biddle, Attorney General of the United States, upon the letter of the Honorable Francis Biddle to Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, and upon the suggestion of immunity filed by the said Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, and upon the libel and complaint theretofore filed, moved the United States District Court for the Eastern District of Louisiana, New Orleans Division, for an order dismissing

the suit of the libelant for want of jurisdiction, on the ground that the suit was one against the property of a friendly foreign sovereign nation whose claim of sovereign immunity was recognized and allowed by the State Department. Annexed to the affidavit submitted in behalf of the Republic of Peru in support of said motion was documentary proof that at all times since August 24, 1937, the steamship *Ucayali* was the exclusive property of the Republic of Peru.

Thereafter, the motion of the Republic of Peru for the dismissal of the suit against it on the ground that it was entitled to immunity from such suits and that its claim to such immunity had been recognized and allowed by the State Department came on to be heard before Honorable Wayne G. Borah, District Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division, who, on the 13th day of October, 1942, rendered his opinion denying the claim of the Republic of Peru to sovereign immunity, on the ground that the said sovereign waived its immunity to suit for the reason that it had appeared generally in the suit because (1) it had applied for extensions of time within which to answer or to plead, and (2) it had taken the deposition of the master of its steamship *Ucayali*. An order was entered pursuant to and consistent with said opinion on or about October 16, 1942. Thereafter the Republic of Peru moved by order to show cause for a re-hearing on the subject of the opinion theretofore rendered in the cause overruling the plea of sovereign immunity, and upon such re-hearing and on or about the 18th day of November, 1942, the Honorable Wayne G. Borah ordered that the said motion be and the same was denied.

III.

A friendly sovereign power is entitled to immunity from suit in American courts by a private suitor.

The right of a friendly sovereign power to immunity from suits in the courts of another country, even in times not as extraordinary as at present, is well recognized, and the procedure employed in the instant case not only is precisely as prescribed in the decisions which have resulted in the granting of immunity, but that procedure has not been objected to or even questioned by libelant. The fact that the State Department recognized and approved the claim of the Republic of Peru to sovereign immunity makes it almost mandatory upon the District Court to grant such immunity and to dismiss the suit against it. Since a friendly foreign power is entitled to plead its immunity from suit as a matter of right, the Court had in fact no jurisdiction to entertain an action against it, and this principle is as applicable in the case of a merchant vessel of such sovereign as to a warship.

In *Berizzi Bros. Co.* v. *s/s Pesaro,* 271 U. S. 562, this Court said, at page 574:

> "We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

In *The Pesaro* case, the Court approved the doctrine which it had theretofore expressed, through Chief Justice MAR-

SHALL, in *The Exchange,* 7 Cranch 116, that a foreign sovereign is entitled to immunity from suit in our courts as a matter of right. While in that case a public armed ship was involved, *The Pesaro, supra,* shows that the same principle applies to all ships owned by foreign sovereigns. In *The Exchange,* Chief Justice MARSHALL said, at page 147:

> "If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."

To the same effect is *The Parlement Belge,* 5 P. D. 197. See also: *Ex Parte Muir,* 254 U. S. 522; *The Navemar,* (2 C. C. A.) 102 F. (2d) 444; *Sullivan* v. *State of Sao Paulo,* (2 C. C. A.) 122 F. (2d) 355. In the latter case, consideration was given to the question of the significance to be attributed to the actions of the State Department and the District Attorney in recognizing and allowing the claim of immunity of a constituent state of the United States of Brazil, and the Court held (p. 357):

> "Evidently some favorable implication must be drawn, for sometimes the Department has declined to act at all, as in Compania Espanola v. The Navemar, *supra,* and Molina v. Comision Reguladora, 91 N. J. L. 382, 103 A. 397, and has even positively expressed itself as opposed to a claim of immunity. The Pesaro, D. C. S. D. N. Y., 277 F. 473."

On the authority of *Miller* v. *Ferrocarrill del Pacifico de Nicaragua,* 18 A. (2d) 688, the Court further held (in the

Sullivan case) that the test of the attitude of the Executive Department through the State Department toward the validity of a claim of sovereign immunity or its recognition and allowance should be supplied by the Executive's representations and not by the technical nature of its appearance. The Court said, page 357:

> "Here the Executive chose to transmit the claim, which act alone has been held to be an implied recognition."
>
> "And when pressed, it did much more. It not only vouched for the accuracy of the statements of fact made by the Brazilian Ambassador, but also declared it to be 'the view of the Department that the interest of the Government of Brazil in the funds, as explained in the Brazilian Ambassador's note of July 11, 1940, is of such character as to entitle them to immunity from attachment by private litigants.' This appears to be a clear recognition of the claim of the Brazilian federal government so far as the Department is concerned • • •."

The Court continued, on the same page:

> "We have no hesitation, therefore, in accepting these communications as the official representation of Executive acceptance of the Ambassador's claims. And therefore we accept for the purposes of decision herein the recitals of fact made by the Ambassador. Compare Banco de Espana v. Federal Reserve Bank, 2 Cir., 114 F. 2d 438, 443. • • •
>
> Courts will undoubtedly accept as conclusive Executive pronouncements on whatever might be considered a 'political,' as opposed to a 'judicial,' question, Doe ex dem. Clark v. Braden, 16 How. 635, 57 U. S. 635, 14 L. Ed. 1090, including the question whether one is a sovereign, Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726; Duff Development Co. v. Kelantan Government (1924) A. C. 797, and the question whether one is a sovereign's privileged diplomatic representative.

United States v. Ortega, C. C. E. D. Pa., Fed. Cas. No. 15, 971; Engelke v. Musmann (1928) A. C. 433; see Ex parte Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222. Such questions as these must have been within the contemplation of the court in the Navemar case, when it said (303 U. S. page 74, 58 St. Ct. page 434, 82 L. Ed. 667): 'If the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.' See Deak, supra, 40 Col. L. Rev. at page 462. For Executive action in respect to such questions, if not actually determinative of them, is at least the best evidence which it is possible to adduce. United States v. Liddle, C. C. E. D. Pa., Fed. Cas. No. 15,598."

LEARNED HAND, C. J., in a separate concurring opinion, said, at page 360:

"I can think of no rationale which will reconcile these doctrines except that the violation of a foreign state's possession is so grave an indignity as *ipso facto* to embarrass the relations between that state and the state of the forum; it is better that the wrongs of the court's nationals should be left to negotiation between the powers."

And again at the same page:

"The mere fact that the Department saw fit to transmit the protest at all was evidence that it regarded the issue as substantial; it might well, as in the case of The Navemar, supra, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667, have left the ambassador to intervene personally. The language chosen, especially in the letter of November 22, 1940, bears out this inference. Not only had the Department earlier vouched for the truth of the 'statements of fact' in the protest, as I have said, but in that letter

> it declared that 'a *prima facie* case had been made' for immunity, and that 'the interest of the Government of Brazil * * * is of such a character as to entitle' the funds to 'immunity.' I cannot read this otherwise than that the Department thought the issue important enough for the district court not to proceed."

And at page 361:

> "Certainly, if the answer depends upon how far the suit will affect foreign relations, only our foreign office ought to decide it."

In the case now before the Court, the situation is identical. See quotation from letter dated May 5, 1942, to the Attorney General of the United States from Honorable Sumner Welles, Acting Secretary of State, quoted *supra*, pages 1, 2.

The several similar cases which have already arisen as a result of the present war amply support the principles heretofore enunciated. See: *The Maliakos*, 41 F. Supp. 697 (S. D. N. Y.); *Margaret-Tassia*, 41 F. Supp. 699; *The Ionnis P. Goulandris*, 40 F. Supp. 924. All three of the cases last cited concerned Greek vessels engaged in private trade but requisitioned by their Government prior to the service of process. On the suggestion of the Greek Ambassador to the Department of State and the notification by the Department of State to the Attorney General that it recognized and allowed the claim of immunity in precisely the same form as in the case at bar, the libels were dismissed.

IV.

The right of a friendly foreign sovereign to immunity should be denied only upon the clearest evidence that it waives or does not wish to assert that right; the mere filing of applications for extensions of time within which to plead or the taking of a deposition in extremis is no such clear expression, and the decisions relied upon by the Honorable Wayne G. Borah do not support his conclusion.

The fundamental principle is laid down in *The Exchange, supra,* page 8, that the right of a friendly foreign sovereign to immunity from suit can be denied only as a result of the exertion of power "in a manner not to be misunderstood." Until the power is so exerted, "the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."

In the case now before the Court, the District Judge has sought to deprive the sovereign, the Republic of Peru, of the right to maintain its dignity as such by immunity from suit, on the strength of somewhat elementary principles decided, in the main, in suits between private parties. The cases upon which the District Court relied exclusively are:

Ervin v. *Quintanilla* (5 C. C. A.) 99 F. (2d) 935;
The Sao Vicente (3 C. C. A.) 295 Fed. 829;
Dexter & Carpenter v. *Kunglig Jarnvagsstyrelsen* (2 C. C. A.) 43 F. (2d) 705;
Puerto Rico v. *Ramos,* 232 U. S. 627;
Murphy v. *Herring-Hall-Marvin Safe Co.,* 184 Fed. 495;
Nelson v. *s/s Munwood,* 1925 A. M. C. 136;
Clark v. *Southern Pacific Co.* (5 C. C. A.) 175 Fed. 122.

Ervin v. *Quintanilla* supports, not the proposition for which it was cited by the District Court, but the position relied upon by the Republic of Peru. In that case it was urged that the Republic of Mexico, the owner of the vessel sought to be released under a plea of sovereign immunity, had entered a general appearance on the following grounds: by (a) asking affirmative relief in the action, that is, that the taking of depositions be postponed; (b) appearing and asking affirmative relief for a defendant, the master of the ship against whom the action ran *in personam;* (c) tendering along with the suggestion of immunity an issue going to the merits, to wit, an issue as to the title and ownership of the vessel; and (d) praying that the libel be dismissed. The Court found, however, that the appearance and proceedings on the part of the Republic of Mexico were conducted throughout (as in the case at bar) "with the specific intent, for the specific purpose, and with the result alone of presenting a claim of immunity from the jurisdiction of the court."

In *The Sao Vicente,* the second case relied upon by the District Court, a general appearance was made by the sovereign which appeared by its proctors, filed a claim of ownership in the usual form, concluding with a prayer for leave to defend the action. The sovereign's proctors filed a stipulation for value and costs conditioned to "abide by all orders of the court, interlocutory and final, and to pay the amount awarded," and the ship was released from custody. Two months after the libel was filed, the sovereign changed its proctors, who filed their answer to the libel and for the first time raised the defense that the vessel was owned by the Portuguese Government, which Government asserted its right to sovereign immunity and protested the assumption of jurisdiction by the District Court. In addition, the Court held that the procedure employed by the sovereign in making its plea of sovereign immunity

was improper. The suggestion of immunity was presented by the Portuguese Minister directly to the Court instead of being presented through the Department of State in conformity with the formula approved in *Ex Parte Muir*, 254 U. S. 522, and the line of decisions which followed it, *supra*, page 9. Although the suggestion of the Portuguese Minister was accompanied by a certificate of the Secretary of State to the effect that the Minister, whose name was subscribed thereto, was duly accredited to this Government, that certificate contained a footnote by the Secretary of State that "For the contents of the annexed document the department assumes no responsibility" (p. 833). On that state of facts, the inappositeness of *The Sao Vicente* case becomes obvious.

Dexter & Carpenter v. *Kunglig Jarnvagsstyrelsen*, the next authority cited by the District Court, is equally beside the point. In that case, the sovereign itself brought suit. A counterclaim was asserted, the suit of the sovereign, the Swedish Government, was dismissed, and the counterclaimant held entitled to recover. Upon proceedings supplementary to execution, it was sought by the Swedish Government to vacate the order of attachment and writ of execution. The Court held that after the sovereign had invoked the jurisdiction of the Court, pleaded to a counterclaim and contested the merits of the respective claims until judgment was rendered against the sovereign, there was both a waiver of jurisdiction and a consent to the exercise of jurisdiction. Certainly it cannot be said that the mere application of the sovereign in the case at bar for extensions of time within which to plead until it could prove its claim of immunity and the taking of a deposition *in extremis*—all under an unmistakable reservation of its right to retain its plea of sovereign immunity—are in any sense analogous to the length to which the case had gone in the *Dexter & Carpenter* suit. Even in that suit, how-

ever, the Court held that although the sovereign had by its protracted course of conduct submitted itself to the jurisdiction, it was still immune from a levy of execution.

The situation in *Puerto Rico* v. *Ramos*, the District Court's fourth case, is as remote from that which exists in the case at bar as can be imagined. There, the Puerto Rican Government voluntarily petitioned to be made a party to an action between a private person and a judicial administrator of an estate. It secured a court order to be made a defendant against the resistance of the plaintiff. A year later the Government of Puerto Rico changed its viewpoint and raised the defense of sovereign immunity. This Court held, however, that "the immunity * * * from suit without its (the Government's) consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step." In the case at bar, the Republic of Peru has consistently, from the inception of the suit until the filing of its motion for dismissal of the libel on the ground of its sovereign immunity, maintained its right to assert such immunity, and neither of the acts which the District Court has held constituted a waiver of its right to assert such immunity were, under the circumstances, in fact inconsistent therewith.

Nelson v. *s/s Munwood*, the sixth case relied upon by the District Court, has no relation whatsoever to the situation involved in the case at bar. It was a suit between private parties, and no question of sovereign immunity was involved. The only point in the case (which is cited in an unofficial reporter only in part and is not officially reported) is as to whether an appearance which is styled special becomes general because a deposition was taken in the case. It seems clear from so much of the decision as is reported that there was not any special reason, as there was here, for the taking of the deposition at the particular

time and, as heretofore indicated, rules of construction which may be appropriate as between private parties, should not, for high reasons of state among others, be applied to a friendly sovereign nation which has throughout the matter reserved its plea and has preserved testimony only because of the imminent danger that its witness would not ever again be available if the case ever proceeded on its merits or if the sovereign for reasons of its own unequivocally elected to allow the suit to proceed.

The same criticism is applicable to *Clark* v. *Southern Pacific Co.*, the District Court's last authority. That also was a suit between private parties in which no sovereign was involved. The only question in that case was whether, after the plaintiff had brought suit in the State Court and the defendant had removed it to the Circuit Court, the taking of a deposition by the plaintiff in the Federal Court waived plaintiff's right to remand the suit to the State Court. The Circuit Court of Appeals for the Fifth Circuit held that in the particular circumstances of the case, the District Court had original jurisdiction despite the lack of diversity of citizenship of the parties and that that jurisdiction was conferred by the consent of the parties. No reservation of plaintiff's right to remand seems to have been made on the taking of the deposition and it was only after the plaintiff had continued to avail himself of the process of the Federal Court did he move to remand the cause to the State Court. Nothing in the state of facts recited in the decision in the *Clark* case makes it a fair analogy to the case at bar.

In upholding the immunity of the sovereign, the same principles are followed in England as are here urged in behalf of the Republic of Peru. In *Republic of Bolivia Explor. Syn.* (1914) 1 Ch. 139, even a general appearance asking for time to file evidence, filing evidence on the merits and raising no question of privilege, were held not to con-

stitute a waiver of immunity. In *The Jassy*, (1906) P. 270, an unauthorized appearance and an unauthorized undertaking by an agent to file bail were held not to cause the vessel to lose her immunity.

The error into which the District Court fell is manifest from the many decisions holding that an agreed postponement does not convert a special into a general appearance. In *Meisukas* v. *Greenough Red Ash Coal Co.*, 244 U. S. 54, the defendant appeared specially for the purpose of objecting to the jurisdiction of the Court over it. Upon the return date of the hearing, it was adjourned on condition that the defendant should not lose its right to plead to the merits if, on the hearing of the question of jurisdiction, authority to entertain the cause was sustained. The appeal to this Court was taken on the ground that the ruling below was not subject to consideration because the challenge to the jurisdiction was waived by the proceedings which were taken to question it. At page 57, the Court said:

> "Generically this would seem to rest upon the proposition that because there was a special appearance on the face of the summons and complaint challenging the jurisdiction, thereby the right to so challenge was waived. But the contrary has been so long established and is so elementary that the proposition need be no further noticed.
>
> Although this be true, the argument further is that the right to be heard on the challenge to the jurisdiction was lost because of the postponement of the hearing on that subject which was granted. This, however, in a different form but embodies the error involved in the proposition just disposed of. But aside from this, as the continuance was granted at the request of the plaintiff and for the purpose of enabling him to be fully heard on the subject of jurisdiction, no further reference to the proposition is required. Again, it is urged that because as a condition of the continuance the court reserved the right of the defendant to plead to the merits if on

the hearing jurisdiction was found to exist, therefore the question of jurisdiction was waived,—a conclusion which is again too obviously wrong to require more than statement to refute it."

See to the same effect:

McMurray v. *Chase Nat. Bank of City of New York,* 10 F. Supp. 960 (D. C. Wyo.);

Pine Hill Coal Co. v. *Gusicki,* (2 C. C. A.) 261 Fed. 974;

Yanuszauckas v. *Mallory S. S. Co.* (2 C. C. A.) 232 Fed. 132;

Budris v. *Consolidation Coal Co.* (E. D. N. Y.) 251 Fed. 673, holding further that a prayer for costs is not a waiver of a special appearance.

V.

Jurisdiction of the Court.

The jurisdiction of the Supreme Court to issue writs of prohibition and mandamus is plainly granted by Judicial Code, Section 234, 28 United States Code, Section 342. The section reads as follows:

"§ 342. (*Judicial Code, section 234.*) *Prohibition and mandamus.* The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party. (R. S. § 688; Mar. 3, 1911, c. 231, § 234, 36 Stat. 1156.)"

The suit herein is, of course, in admiralty, and a foreign sovereign state is a party therein. The denial of the motion to dismiss on the ground of sovereign immunity is obviously not appealable.

VI.

Conclusion.

The want of authority in the District Court to entertain this proceeding against the property of a friendly foreign sovereign or to assume jurisdiction over the subject matter of the libel, particularly in the light of the recognition by the Department of State of the right of the Republic of Peru to immunity from suit is so evident that the writ of prohibition should issue as prayed. The question of American foreign policy under war conditions, particularly as concerns all but two South American republics, is one of the greatest moment. Under present circumstances, even more than in normal times, those relations should, as was said by LEARNED HAND, C. J., in *Sullivan* v. *State of Sao Paulo, supra,* page 11, be left for determination to the Executive and not to the Judicial Departments and those circumstances justify the request of the Republic of Peru that the questions submitted to this Court now shall be fully determined and the error into which the District Court has fallen corrected.

Two principles seem to emerge from the decided cases: First, a sovereign (to that extent like any other litigant) cannot come into and go out of court at will finally to withdraw when the controversy goes against it. In the present cause, however, the sovereign was brought into court against its will and perpetuated testimony only as a necessary measure created by the emergency of war to protect itself if its plea of immunity should be overruled. The

second and more potent principle is that in our Government of divided powers, the courts yield to the Executive in matters involving our friendly relations with foreign nations. When present world conditions are considered, this latter principle cannot be thought either unwholesome or unimportant.

Respectfully,

MONROE & LEMANN
HAIGHT, GRIFFIN, DEMING & GARDNER

By EDGAR R. KRAETZER,
Proctors for the Republic of Peru.

HERBERT M. STATT,
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of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 13 Original

In the Matter

of the

Petition of the REPUBLIC OF PERU, owner of the Peruvian Steamship "UCAYALI," for a writ of prohibition and/or a writ of mandamus against the Honorable WAYNE G. BORAH, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the other judges and officers of said court.

FURTHER BRIEF ON BEHALF OF THE REPUBLIC OF PERU, SUBMITTED PURSUANT TO THE ORDER OF THIS COURT DATED JANUARY 18, 1943

MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
Proctors for the Republic of Peru.

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Statement.

By direction of the Court in the order entered January 18, 1943, on the rule "requiring the respondent to show cause why leave to file the petition for writ of prohibition and/or mandamus should not be granted * * *"

> "Counsel are requested to discuss in their briefs and on the oral argument the question of the jurisdiction of this Court to entertain the petition and to grant the relief sought, and to discuss the effect of the failure to present the application to the Circuit Court of Appeals."

In compliance with that direction the following additional brief is respectfully submitted in support of original and exclusive jurisdiction.

POINT I.

By statute and precedent this Court has always had original jurisdiction to issue writs of prohibition and/or mandamus to the District Courts

Statutory authority of this Court to issue original writs of prohibition and/or mandamus under the circumstances presented by this petition is clearly conferred by the Judicial Code, Section 234 (U. S. Code, Title 28, Section 342), which reads:

> "§342. *(Judicial Code, Section 234.) Prohibition and mandamus.* The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice-consul is a party. (R. S. §688; Mar. 3, 1911, c. 231, §234, 36 Stat. 1156.)"

That the extraordinary and summary relief of direct and original recourse to our highest court is authorized in circumstances in which prohibition and/or mandamus are appropriate is a recognition of probable exigency and of the futility of requiring an intermediate appeal to a Circuit Court of Appeals, limited in its jurisdiction to final determinations by the District Court and hence powerless to review an interlocutory rejection of a plea of sovereign immunity, as in the case at bar. (Please see *infra*, p. 6, *et seq.*)

In 1795, according to what appears to be the earliest officially recorded case on the subject, this Court in *United States* v. *Peters*, 3 U. S. (3 Dallas) 121, on original application issued its writ of prohibition to the District

Court to prevent assumption of jurisdiction in admiralty over a vessel owned by the French Republic and against the protest of that nation. Although the present Section 234 of the Judicial Code (U. S. Code, Title 28, Section 342) was then in force as Act of September 24, 1789, c. 20, §13, no reference was made to it; the need for intermediate appeal was apparently argued (p. 128), but rejected without comment.

In *Ex parte State of New York, No. 1,* 256 U. S. 490, prohibition issued directly out of this Court without prior application to the Circuit Court of Appeals to restrain a suit against certain tugboats, the claimants of which sought to implead the State Superintendent of Public Works as charterer thereof. In that case, this Court said:

> "The power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction is specifically conferred upon this court by §234, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156). And the fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction. *In re Cooper,* 143 U. S. 472, 495" (pp. 496-497).

The case also holds that it is immaterial whether the suit is *in rem* or *in personam* (p. 498); the essential nature of the cause, in effect against a sovereign, entirely governed its disposition (p. 500).

Ex parte State of New York No. 2, 256 U. S. 503, reaches the same result.

The Western Maid, 257 U. S. 419, likewise came into this Court on direct application for a writ of prohibition and/or mandamus without preliminary reference to the Circuit Court of Appeals. The case decides that prohibi-

tion will issue out of this Court to prevent suits against the United States arising out of collisions. As in the case at bar, the vessels were owned, absolutely or *pro hac vice,* by a sovereign state, the United States, and were engaged in a public service, namely, the carriage of food to the war-stricken peoples of Europe in 1919.

In *Ex parte Indiana Transportation Co., Petitioner,* 244 U. S. 456, this Court likewise granted an original petition for a writ of prohibition to the District Court. In that case, a libel had been filed against the vessel owner but subsequently leave was granted to amend the libel to add 373 other libelants. The petitioner had excepted below on the ground that it could not in law be called upon to answer an amended libel as to the additional libelants and on the further ground that the Court had not jurisdiction over it with respect to such additional libelants, but these exceptions were overruled. This Court granted a writ of prohibition because the District Court attempted to exceed its jurisdiction.

In re Cooper, 143 U. S. 472, is often cited for its enunciation of the legal principles upon which rests the original jurisdiction of this Court to issue writs of prohibition to the district courts in admiralty causes. In that case, the Court said (pp. 494-495):

> "Section 688, Revised Statutes (now Judicial Code, §234), provides: 'The Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction.' And although we were of opinion when the application for the rule was made, and subsequently held (*McAllister* v. *United States,* 141 U. S. 174), that the District Court for Alaska was not one of the courts mentioned in Article III of the Constitution, declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall from time to time establish, we

nevertheless concluded that where the District Court of Alaska was acting as a District Court of the United States and, as such, proceeding in admiralty, it came within that section, and this court had power to issue the writ of prohibition to that court in a proper case; and as the questions involved could be, in our judgment, more satisfactorily presented upon a return, we granted the rule. *In re Cooper, Petitioner,* 138 U. S. 404.

The writ thus provided for by section 688 is the common law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. Its office is to prevent an unlawful assumption of jurisdiction, and not to correct mere errors and irregularities. *Ex parte Gordon,* 104 U. S. 515; *Ex parte Ferry Company,* 104 U. S. 519."

In the *Cooper* case, the writ was denied because the Court found that the District Court clearly had jurisdiction of the cause and that the petitioner's proper remedy was by appeal from the final decree which had theretofore been entered in the District Court. The case now before the Court has not proceeded to trial and, of course, no final or interlocutory decree can be entered. (Please see Point II, *infra,* p. 6:)

In *Ex parte Phenix Insurance Co.,* 118 U. S. 610, the District Court of the United States for the Eastern District of Wisconsin, sitting in admiralty, asserted jurisdiction over a vessel owner in a case in which damages resulted from a fire in a planing-mill which the petitioner's vessel had passed. This Court granted prohibition against the District Court as a matter of original jurisdiction, on the ground that the cause was not cognizable in admiralty.

For additional authorities sustaining the power of this Court under the statute, see also:

Ex parte Christy, 44 U. S. 292;

Ex parte Gordon, 104 U. S. 515;
In re Cooper, 138 U. S. 404;
Smith v. *Whitney,* 116 U. S. 167;
In re Baiz, 135 U. S. 403;
In re Fassett, 142 U. S. 479;
In re Rice, 155 U. S. 396.

POINT II.

No intermediate appeal lies to the Circuit Court of Appeals from an order of the District Court rejecting the plea of sovereign immunity.

An order of the District Court rejecting a plea of sovereign immunity does not determine any rights or liabilities of the parties with such finality as to come within the statutory provisions regarding appeals to the Circuit Court of Appeals (Judicial Code §128; 28 U. S. C. A. 225).

On appeal from a final decree on the merits of the controversy after trial, the Circuit Court of Appeals would, of course, have the right to review the question of assumption of jurisdiction, but no statutory or other authority vests it with power to entertain and grant an original application for prohibition and/or mandamus to prevent assumption of jurisdiction in admiralty causes.

The Circuit Court of Appeals for the Second Circuit so held in *Muir* v. *Chatfield,* 255 Fed. 24, writing in part:

> "We will not inquire whether the order of Judge CHATFIELD was right or wrong, because we are without power to grant the prayer of the petition (for a writ of prohibition and a writ of mandamus) in an original proceeding" (p. 25).
>
> • • • • • • • • • •
>
> "This section (§234 of the Judicial Code, 28 U. S. C. 342) confers original jurisdiction in the two specific instances mentioned; i. e., the Supreme Court

> may issue writs of prohibition to the District Courts when they are proceeding as courts of admiralty and writs of mandamus to any federal court when a state or an ambassador or other public minister or a consul or vice consul is a party. This power is without reference to appellate jurisdiction" (p. 26).
>
> * * * * * * * * *
>
> "* * * We regard ourselves as without power to grant the prayer of the petition because there has been no appeal from Judge CHATFIELD's order, and because that order, whether right or wrong, does not interfere in any way with the jurisdiction of this court. He has refused to discharge the vessel, except upon the owner's giving a bond, so that the jurisdiction of the District Court is maintained, and the appellate jurisdiction of this court is in no manner interfered with" (p. 27).

On later direct application to this Court under the title *Ex parte Muir,* 254 U. S. 522, the propriety of the decision in *Muir* v. *Chatfield, supra,* was not questioned; and although the writ was refused because the applicant had not presented its claim of immunity in approved form, the jurisdiction and power of this Court was recognized in these words:

> "The power of this court, under §234 of the Judicial Code, to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty, to prevent an unlawful assumption or exercise of jurisdiction, is not debatable" (p. 534).

In *Ex parte, Muir, supra; Ex parte Hussein Lufti Bey,* 256 U. S. 616; and *Ex parte Transportes Maritimos (Sao Vicente),* 264 U. S. 105, the plea of sovereign immunity was the basis for an original application to this Court for a writ of prohibition. In none of those cases was there an intermediate appeal or any suggestion of its necessity; in each of those cases the jurisdiction of this Court to enter-

tain and consider the application was not questioned. In each of those cases the ground for the rejection was a fatal defect in the formal presentation of the plea. In the first case the public character of the vessel was in doubt; in the second and third the State Department refused its offices.

In the case at bar every detail of the prescribed formula for the presentation of a plea of sovereign immunity has been meticulously fulfilled and has not even been questioned in the proceedings heretofore had. No doubt is left of the character of the vessel, and the *bona fides* of the claim of sovereign immunity and the desirability of its recognition is attested to by every necessary diplomatic and executive officer of the United States. (See p. 6 of the Brief for the Republic of Peru, submitted in support of the petition and discussion and cases cited under Point III, p. 8 *et seq.* in that brief.)

CONCLUSION.

This Court has jurisdiction to entertain the petition and to grant the relief sought and no intermediate appeal to the Circuit Court of Appeals is necessary or possible. To require a final determination below and a preliminary appeal to the Circuit Court of Appeals would defeat the purpose of the statute.

In *Ex parte Gordon,* 104 U. S. 515, this Court said of the writ of prohibition provided for by Judicial Code §234:

> "* * * Its office is to prevent an unlawful assumption of jurisdiction" (p. 516).

and emphasized in *Ex parte State of New York No. 1,* 256 U. S. 490, at page 503, the impracticability of permitting proceedings so challenged "to run their slow course to final decree."

The advantage of and necessity for expedition in the determination of a claim of sovereign immunity and of prompt elimination of threatened assault upon that status, always so vigilantly apprehensive, needs no argument. Neither is it necessary to labor the plain fact that in practical result early recognition of and acquiescence in a valid claim of immunity has material advantages to the courts, to the Executive Departments and to litigants.

Under present conditions, and in particular with regard to shipping practises in this emergency period, the question here presented is of national and international importance.

The Republic of Peru, as petitioner herein, respectfully submits that this Court has jurisdiction in this matter and prays for favorable consideration of its petition.

Dated, February 5, 1943.

Respectfully submitted,

MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
By EDGAR R. KRAETZER,
Proctors for the Republic of Peru.

HERBERT M. STATT,
LINDSAY D. HOLMES,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 13 ORIGINAL

Ex Parte Republic of Peru,

Owner of the Peruvian SS. UCAYALI.

Return of Wayne G. Borah, One of the Judges of the District Court of the United States for the Eastern District of Louisiana, to the Rule Issued Herein by the Supreme Court of the United States on January 18, 1943, to Show Cause why Leave to File the Petition for a Writ of Prohibition and/or Mandamus Herein Should Not be Granted.

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I, Wayne G. Borah, one of the Judges of the District Court of the United States for the Eastern District of Louisiana, in obedience to the rule herein issued out of this court on the 18th day of January, 1943, (a certified copy of which was attached to the petition sent to me by the marshal of this court), directing me and/or the judges and officers of the District Court of the United States for the Eastern District of Louisiana to show cause why leave to file the petition herein for a writ of prohibition and/or mandamus should not be granted in accordance

with the prayer of said petition, do hereby certify and make the following return to this Honorable Court:

The writ of prohibition and/or mandamus should be denied because of the facts disclosed by the record in this case and for the facts and reasons stated in my opinion herein set out in the transcript, pages 92-97, which opinion is made part of this return as if fully set out herein.

If it be necessary for me to be formally represented by counsel in the Supreme Court, I hereby appoint Jos. M. Rault, one of the proctors for Galban Lobo Co., S. A., libelant in the district court, as said attorney.

And having fully answered on behalf of myself and the District Court of the United States for the Eastern District of Louisiana and the judges and officers thereof, I pray that said writ may be denied and that we may be hence dismissed.

In witness whereof I, Wayne G. Borah, one of the judges of the District Court of the United States for the Eastern District of Louisiana, have hereunto set my hand and the seal of said court on this 5th day of February, 1943.

WAYNE G. BORAH,

United States District Judge.

(Seal of District Court of the United States for the Eastern District of Louisiana.)

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BRIEF ON BEHALF OF GALBAN LOBO CO.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 13 Original

In the Matter

of the

Petition of the Republic of Peru, Owner of the Peruvian Steamship "UCAYALI", for a Writ of Prohibition and/or a Writ of Mandamus against the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the Other Judges and Officers of said Court.

BRIEF ON BEHALF OF GALBAN LOBO CO., S. A., LIBELANT IN THE DISTRICT COURT.

TERRIBERRY, YOUNG, RAULT & CARROLL,
MICHELSEN & CHAMBERLAIN,
Proctors for Galban Lobo Co., S. A.

JOS. M. RAULT,
GEO. H. TERRIBERRY,
WALTER CARROLL,
Of Counsel:

JOS. M. RAULT,

Attorney for Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, Respondent in Rule.

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IN THE

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BRIEF ON BEHALF OF GALBAN LOBO CO., S. A., LIBELANT IN THE DISTRICT COURT.

HISTORY OF PROCEEDINGS.

For greater clarity and certainty, we think it desirable to restate the facts of this case. They are set out in some detail in the affidavit of Jos. M. Rault (R. 62-68).

On November 18, 1941, at Callao, Peru, a charter party was entered into between Compania Peruana de Vapores y Dique del Callao (referred to as La Compania) and Mr. Enrique Pardo of Lima, charterer, the agent in Peru of Galban Lobo Co., S. A., a Cuban corporation, whereby La Compania agreed to let and Pardo agreed to hire the Peruvian SS UCAYALI for a voyage from ports in Peru to the port of New York, for the carriage of sugar. No reference was made in that charter to the Republic of Peru, nor to its alleged ownership of the vessel. Indeed, in clause 6 of the charter party, in which the contracting parties bound themselves, La Compania referred to "its freight and its steamer". (R. 66.)

Approximately 3600 tons of sugar in bags was loaded on the UCAYALI at Peruvian ports under this charter party and bills of lading therefor issued by La Compania. None of these bills of lading made any reference to the Republic of Peru or to its alleged ownership of the vessel. La Compania in all respects acted as owner (R. 66, 84, 90).

On arrival of the SS UCAYALI at Balboa about March 11, 1942, the officers of the ship had a meeting with the master and decided that they would not go to New York because of the submarine sinkings on the Atlantic coast. Through the vessel's agent and the Peruvian Consul they transmitted this definite decision to Peru and were then verbally instructed to proceed to New Orleans (R. 81, 82). There is no authentic evidence to show that these instructions came from the Peruvian government, although the master claims that the Peruvian Consul told him he had instructions from the Government of Peru. No written orders of any kind were given the master. About March

23rd the SS UCAYALI arrived at New Orleans and there proceeded to discharge her cargo, contrary to the terms of the charter party and the instructions of Galban Lobo Co.

On March 30, 1942, Galban Lobo Co., S. A., filed its libel in the United States District Court at New Orleans against Compania Peruana de Vapores y Dique del Callao, alleged on information and belief to be the owner of the UCAYALI, and against the UCAYALI, seeking to recover damages in the amount of $100,000.00 growing out of the breach of the charter party between libelant's agent in Callao and La Compania. Admiralty process *in rem* was issued against the UCAYALI, which was seized by the United States Marshal on March 31st. She remained under seizure until she was released on bond.

The Republic of Peru for the first time injected itself into the matter on April 9, 1942, when a sworn claim was filed by it in which it alleged itself to be the owner of the UCAYALI and stated that it "prays to defend accordingly" (R. 17). This claim further stated "the filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant, particularly but not exclusively sovereign immunity".

On the same day a surety release bond, dated April 9th, in the amount of $60,000.00, whereon the Republic of Peru was principal and the National Surety Company was surety, was filed for the release of the UCAYALI (R. 53). This bond though containing a reservation identical with

that contained in the claim was otherwise in the usual form, the condition of the bond being

> "that if said claimant and surety abide by all the orders interlocutory or final of the court and pay the libelant the amount awarded by final decree rendered in the court to which the process is returnable, or in any appellate court, then the foregoing obligation is to be voided, but otherwise it will remain in full force and effect."

We were advised by proctors for the Republic of Peru that they desired to take the testimony of the master of the UCAYALI. We attended at their office in New Orleans on April 11, 1942, at which time the testimony of Francisco Olsen, master of the UCAYALI, was taken on the merits of the case.

Before the testimony began, Mr. Nicholas Callan, of the firm of Monroe & Lemann, proctors for the Republic of Peru, stated as follows (R. 69-70):

> "Mr. Callan:
>
> "The testimony of Francisco Olsen, the master of the Peruvian Steamship Ucayali, is taken with full reservation and without waiver of all defenses and objections which may be available to respondent and claimant, particularly but not exclusively sovereign immunity; and the appearance of counsel for the Government of Peru and the Steamship Ucayali is for the special purpose only of taking the testimony of the master under the reservation aforesaid."

Mr. Rault, as proctor for libelant, then stated as follows:

> "Mr. Rault:
>
> "I agree to the taking of the testimony of the master by consent at the offices of Messrs. Monroe &

Lemann on Saturday, April 11, 1942, and agree to waiving, signing, sealing, certification and filing and all the other formalities provided by the de bene esse statute. I, however, do not agree to any reservation or attempted reservation as to the plea of sovereign immunity or any other plea that may in fact be waived by the taking of the testimony of the master."

Francisco Olsen, having been duly sworn, began his testimony on direct examination as follows:

"Direct Examination.

"Mr. Callan:

"Q. Captain, you are the master of the Steamship Ucayali?

"A. Yes, sir."

Mr. Rault then, on behalf of libelant, made the following statement:

"Mr. Rault:

"I wish to say, on behalf of libelants, that we shall take the position that the testimony of the Captain of the Ucayali and the appearance of counsel is a general appearance and waiver of any plea of sovereign immunity, or any plea connected therewith."

Mr. Callan then proceeded with the direct examination of the master, in which there were brought out many facts dealing with the merits of the litigation. During the course of the testimony the Republic of Peru, through Mr. Callan, put in evidence six exhibits marked respectively Peru Exhibits 1 to 6, inclusive, being as follows (R. 76-77):

1. Peru Exhibit 1, charter party covering the Ucayali between La Compania Peruana de Vapores y Dique del Callao and Mr. Enrique Pardo of Lima (alleged by libelant to be its agent);

2. Peru Exhibits 2, 3, 4, 5, and 6, bills of lading issued by the Compania Peruana de Vapores y Dique del Callao covering cargo loaded by the Ucayali at various ports.

The return day on which answer or other pleading was due by the claimant and respondent in accordance with the rules of court was April 20, 1942.

On April 18th "the Republic of Peru, respondent and claimant, through its Proctors, Monroe & Lemann", on *ex parte* motion obtained the following order from the court (R. 20):

> "On motion of Republic of Peru, respondent and claimant, through its proctors, Monroe & Lemann, who appear herein for the special and limited purpose of presenting this motion and with full reservation and without waiver of any defenses and objection which may be available to mover, particularly but not exclusively, sovereign immunity, and on suggesting to the Court that the return day to answer or otherwise plead to the libel herein expires on April 20th, and on further suggesting to the Court that mover requires an extension of at least twenty (20) days to present fully and adequately its pleas and defenses to said libel, particularly, but not exclusively, the defense of sovereign immunity;
>
> "It is Ordered that the time to answer or otherwise plead to the libel filed herein be and the same is hereby extended for a period of twenty (20) days from April 20th, 1942.
>
> "New Orleans, La. April 18, 1942.
> (Signed) A. J. CAILLOUET,
> Judge."

It will be noted that the motion requested the Court for an extension of 20 days:

> "to present fully and adequately its pleas and defenses to said libel, particularly, *but not exclusively,* the defense of sovereign immunity;" (Italics ours.)

and that the order as prayed for by the Republic of Peru gave the requested extension of 20 days:

> *"to answer or otherwise plead* to the libel filed herein" (Italics ours).

On May 8th and May 29, 1942, further *ex parte* motions were filed by the "Republic of Peru", and further orders of court in similar terms obtained granting additional extensions.

On June 17th the proctors for the Republic of Peru, appearing specially, moved the court to dismiss the libel for want of jurisdiction, on the ground that the suit was against the vessel of a friendly foreign sovereign.

On June 29th the United States Attorney, under instructions of the attorney general and of the State Department, filed a suggestion of immunity and asked that the UCAYALI be declared immune from seizure and be released.

On July 7th Galban Lobo Co., S. A., filed its answer and return to the suggestion of immunity and the motion to dismiss (R. 58). It denied that the UCAYALI was not subject to the jurisdiction of the court, or immune from seizure, and averred that if the UCAYALI was the property and in the possession of the Republic of Peru at the

time of the filing of the libel, any immunity to which she may have been entitled at that time had been waived by actions in this case by the Republic of Peru, which constituted a general appearance, to-wit:

(a) By filing as respondent and claimant a claim to said vessel;

(b) By filing a surety release bond agreeing to "abide by all the orders, interlocutory and final, of the court and pay the libelant the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court".

(c) By taking, over the objection of libelant, the testimony of the master of the UCAYALI on the merits of the case, and by offering in evidence through this witness the charter party and bills of lading, the terms of which are alleged to deal with the merits of the case;

(d) By filing *ex parte* motions for and obtaining and filing orders of court extending "the time to answer or otherwise plead to the libel". (R. 58-60.)

The matter, on July 8th, was submitted to the district judge on argument and briefs. On October 13th the court handed down its opinion holding that the actions of the Republic of Peru constituted a general appearance and that the plea of sovereign immunity had been waived. The opinion of the court is found in the record at pages 92-97 It is reported in 47 F. Supp. 203, 1942 A. M. C. 1479. The matter was later reargued on an application for rehearing, which was denied on November 18th.

POINT I.

A Sovereign Waives the Plea of Sovereign Immunity by Any Action in the Case that Constitutes a "General Appearance".

The plea of sovereign immunity "is a personal privilege which it (the sovereign) may waive at pleasure". *Clark v. Barnard,* 108 U. S. 426.

This court has said in *Porto Rico v. Ramos,* 232 U. S. 627, 631, "* * * The immunity of a sovereign from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

In this case the attorney general of Porto Rico in a suit to which that sovereign was not a party appeared on behalf of the people of Porto Rico and represented to the court that the people of Porto Rico were interested parties to the action. The court thereupon ordered the people of Porto Rico made a party defendant. Later the attorney general appeared specially and challenged the jurisdiction of the court on the ground of sovereign immunity. This court held that Porto Rico, having been made a party defendant on its own motion and having made a general appearance, could not thereafter challenge the jurisdiction of the court.

The doctrine asserted in the *Ramos* case has been recognized under varying facts and circumstances, in:

Richardson v. Fajardo Sugar Co., 241 U. S. 44;
Luckenbach Steamship Co. v. Barque THEKLA, 266 U. S. 328;
Veitia v. Fortuna Estates, (1st C. C. A., 1917), 240 Fed. 256, 262;
Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen, (2d C. C. A., 1930) 43 Fed. (2d) 705;
United States v. National City Bank of New York, (2d C. C. A., 1936), 83 Fed. (2d) 236, 238.

It is not limited to those cases in which the sovereign has made a voluntary appearance. It has repeatedly been recognized as applicable to those cases in which the sovereign has taken action in court inconsistent with the claim of a special appearance made solely for the purpose of challenging the jurisdiction of the court.

Ervin v. Quintanilla, (5 C. C. A., 1938), 99 Fed. (2d) 935, cert. den. 306 U. S. 635;
The SAO VICENTE, (2d C. C. A., 1922), 281 Fed. 111;
The SAO VICENTE, (3d C. C. A., 1924), 295 Fed. 829;
The MANGALIA, (S. D. N. Y.), 1942 A. M. C. 35; and Cases cited under Point III.

In *Ervin v. Quintanilla,* which involved a plea of sovereign immunity by the Republic of Mexico, the Circuit Court of Appeals for the Fifth Circuit said (page 338):

"We of course agree with appellant that a sovereign may waive his claim of immunity and subject himself

> to a jurisdiction which, but for his submission, he would be immune from. He may do this by a general appearance, or by acts or conduct inconsistent with the claim of a special appearance made for the purpose, alone, of raising the jurisdictional question. Cases of that kind are The Sao Vicente, 3 Cir., 295 F. 829; Dexter & Carpenter v. Kunglig, 2 Cir., 43 F. 2d. 705."

The *Quintanilla* case was cited with approval by the Supreme Court of New York, Appellate Division, in *Field v. Predionica I. Tkranica A. D.*, 31 N. Y. S. 2nd 739, 263 N. Y. App. 158. In holding that the Royal Yugoslav legation should be granted leave to intervene by special appearance to assert its claim of ownership and sovereign immunity in respect of certain cotton that was under seizure, the Appellate Division commented on waiver of sovereign immunity, saying (page 743):

> "A sovereign may waive his claim of immunity and subject himself to jurisdiction by a general appearance, or by conduct on his part inconsistent with a special appearance." (Citing Ervin v. Quintanilla.)

POINT II.

Any Action by the Sovereign which is not Solely for the Purpose of Challenging the Jurisdiction of the Court is a General Appearance Irrespective of Any Attempted Reservation in the Terminology of the Pleading.

2 Ruling Case Law, 327:

> "When a defendant intends to rely on want of jurisdiction over his person he must appear if at all for the sole purpose of objecting to the jurisdiction of the court. An appearance for any other purpose is usually considered general. If the appearance is a general one, the fact that it is expressly limited by its terms as special does not prevent it from being general, as all appearances are presumed to be general."

By overwhelming authority the following propositions are established:

1. An appearance is special where it is made for the *sole* purpose of objecting to the jurisdiction of the court. *6 C. J. S.* page 6; *4 C. J.* page 1316, and cases cited in notes.

2. The nature of an appearance as general or special is not controlled by the designation given it by the appearing party. It is what the appearing party does rather than what he says that counts. *6 C. J. S.* page 7; *4 C. J.* page 1317, and cases cited in notes.

> "The fact that an appearance is styled as special will not save it from being declared general if a con-

sideration of the substance discloses that the appearance was made for a purpose or purposes other than to question the jurisdiction of the court over the appearing party." *6 C. J. S.* page 8.

3. Appearances in the absence of anything to the contrary are presumed to be general. The only effect of designating an appearance as special is to rebut this presumption. *6 C. J. S.* pages 7 and 8; *4 C. J.* pages 1317, 1318, and cases cited in notes.

In *Crawford v. Foster*, 84 Fed. 939 (C. C. A. 7), the law is stated thus (syllabus):

> "A special appearance for the purpose of objecting to the jurisdiction becomes general if the defendant then disputes the merits of the cause and no words of reservation can make an appearance special which is in fact to the merits."

In *Massachusetts Bonding & Insurance Company v. Concrete Steel Bridge Co.*, (C. C. A. 4), 37 Fed. (2d) 695, the Court at page 701, quoted with approval the following language from *Dailey Motor Company v. Reeves*, 184 N. C. 260, 114 S. E. 175, 176:

> "Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he

ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not."

See also *Stirling Tire Corporation v. Sullivan,* (C. C. A. 9), 279 Fed. 336; *Ruksdell v. Star,* (S. D. Cal.), 13 Fed. (2d) 478. There is overwhelming authority to support the conclusion of the District Judge (R. 96):

"In determining whether there has been a general appearance or submission to the jurisdiction the intent of the pleader is to be determined not by what he says but by the nature of what he does. As was said in Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495, 'The effect is not to be deduced from what the party may have intended but from what he did. It is the act which speaks, and not the secret purpose.'"

Petitioner in its brief, Point 4, appears to take the position that these principles which are admittedly applicable to private litigants cannot be held as controlling the actions of a sovereign in court. We know of no authorities to this effect, and we find none in petitioner's brief.

Indeed, in *Ervin v. Quintanilla, supra,* the Circuit Court of Appeals for the Fifth Circuit declared the law to be as follows (page 938):

"Courts have rightly refused to permit persons or sovereigns not subject without their consent to the

jurisdiction of the court, to come in and out of a court at will. They have thus uniformly held that where jurisdiction has been invoked or has been submitted to by a general appearance, there can be no later assertion of immunity and withdrawal. Porto Rico v. Ramos, 232 U. S. 627, 34 S. Ct. 461, 58 L. Ed. 763; Kingdom of Roumania v. Guaranty Trust, 2 Cir., 250 F. 341, Ann. Cas. 1918E, 524, and cases cited. They have also held that whether there has been a general appearance or submission to the jurisdiction is to be determined by the nature of the acts done and the intent with which they were done, giving effect in this determination, of course, to the principle that actions are intended to have their usual and natural consequences, and that a litigant will not be heard to say that he did not intend the natural consequences of clear and unequivocal acts."

If the actions of the Republic of Peru in this case were not in fact for the *sole* purpose of challenging the jurisdiction of the district court, then the appearance of the Republic of Peru was general and not special and it subjected itself to the jurisdiction of the court in spite of any verbal reservations made.

POINT III.

The Actions of the Republic of Peru in (a) Filing Claim to the Vessel, (b) Filing a Corporate Surety Release Bond, (c) Taking the Testimony of the Master on the Merits of the Case, and (d) Applying for and Obtaining Orders of Court Extending its Time within which "to Answer or Otherwise Plead" to the Libel Constituted a General Appearance.

The Republic of Peru by filing claim and bond substituted for the vessel the sovereign as claimant and the National Surety Corporation as surety as parties respondent in the case and "prayed to defend accordingly". The bond by its specific terms submitted the claimant and the surety to "all of the orders interlocutory or final of the court." Neither the claim nor the bond was devoted exclusively to challenging the jurisdiction of the court. They were actions of a general nature such as any owner would be required to take in order to regain possession of property under seizure in rem in the admiralty court. They invoked the power of the court not for the purpose exclusively of challenging the jurisdiction but for the purpose of obtaining the property and removing it from the jurisdiction. Petitioner urges that it was necessary at once to release the SS UCAYALI from the libel so that the vessel might engage in the transportation of materials and supplies for the United States government. No such representation was made in the claim or bond. Neither document was devoted *exclusively* to laying a foundation for the plea of sovereign immunity. The Republic of Peru sought in the claim and bond to release the ship and at

the same time to reserve to itself the right either of pleading to the merits or of pleading sovereign immunity. Both documents (R. 17, 54) contain the phrase "without prejudice and waiver of *all* defenses and objections which may be available to respondent and claimant particularly *but not exclusively* sovereign immunity". (Italics ours.)

Petitioner's position would be quite different and much stronger if in both the claim and the bond it had stated that it was appearing specially and exclusively for the purpose of pleading sovereign immunity and if it had inserted in the bond a provision that the bond be void if the plea of immunity was maintained.

Assuming, however, *arguendo* (as did the district judge) that respondent's action in claiming and bonding the UCAYALI did not amount to a general appearance, there is no escape from the conclusion that respondent entered a general appearance by taking the testimony of the master for use in the trial of the case on the merits (over the specific objection of libelant), and by filing *ex parte* motions for extensions of time within which "to answer or otherwise plead to the libel". Respondent requested the extensions "to present fully and adequately its pleas and defenses to said libel particularly *but not exclusively* the defense of sovereign immunity" (Italics ours). Three extensions were obtained, one for twenty days on April 18th, another for twenty days on May 8th, and a third for twenty days on May 29th.

Petitioner urges that these extensions were necessary so that it might perfect the formalities prerequisite to the filing of the plea of sovereign immunity, and that the

time was required because of the necessity for communication between Peru and Washington to obtain instructions for the Peruvian Embassy at Washington to make representations to the American Department of State, the necessity that the Department of State make appropriate requests of the Attorney General, and for the latter to instruct the United States Attorney for the Eastern District of Louisiana.

The argument of necessity, if in law it avails petitioner anything, is without merit and based upon a false assumption, because it ignores the alternate course which was open to the Republic of Peru. The respondent did not have to wait for action by the State Department and the Department of Justice. The Peruvian ambassador himself could have filed a suggestion in court before the return day asserting the alleged public status of the vessel and claiming her immunity to suit, as was done in *The NAVEMAR*, 303 U. S. 68. It is true that the suggestion would not have been conclusive and that the ambassador would have had to present proof in support of his contentions, as any other claimant in a court of the United States, but this procedure would have given the respondent ample time to have the State Department request the Deparment of Justice to instruct the United States Attorney to file the plea of immunity. But respondent did not choose to take this course, although there was ample time between the filing of the libel and the return day within which to do so. The vessel was seized on March 31st. The claim and bond were filed on April 9th. The testimony of the master of the UCAYALI was taken by respondent on the merits on April 11th. The return day

was April 20th. The record shows that the Peruvian Ambassador had received his instructions from his government to plead sovereign immunity at least five days prior to the original return date. On April 15th he presented a formal note to the State Department asking that the Department of Justice be instructed to file a suggestion of sovereign immunity in this case (R. 47, 48).

Thus when the power of the court was invoked to grant the first extension order on April 18th, the Peruvian Ambassador was fully authorized and instructed to plead sovereign immunity and could have made a special appearance in court in his own person without waiting for the Department of Justice to act. The *ex parte* orders granting extensions were thus obtained by the Republic of Peru freely and voluntarily.

The respondent, without necessity and to suit its own purpose, invoked the power of the court to grant that which only a court vested with jurisdiction could grant—an extension of time within which "to answer or otherwise plead" to the libel.

Two days after the UCAYALI had been released, respondent took the testimony of the master of the vessel on the merits of the case. This was done over the objection of proctor for the libelant that the taking of this testimony and appearance of counsel for the Republic of Peru constituted a general appearance and was a waiver of the plea of sovereign immunity (R. 69-70). It is difficult to conceive of an action in litigation that is more general in its nature than the taking of the deposition of a witness on the merits. If this court sustains the district

judge in holding that the plea of sovereign immunity has been waived, the testimony of this witness practically in its entirety will be used by the Republic of Peru to support its defenses to the libel as set out in the answer that it will file. Petitioner urges that the deposition was taken because the Republic of Peru considered it imperative on account of war conditions to perpetuate the testimony of the master. This if true is not a legal excuse. On the same theory petitioner could have taken the testimony of all of the witnesses on the UCAYALI and for that matter, if it thought it desirable, of seamen on any other ships bound for sea. It had its choice of resting on its plea of sovereign immunity, or of proceeding with the merits of the case thereby making a general appearance. Of its own volition it chose the latter course, and must bear the legal consequences which follow. It cannot blow both hot and cold. It may be noted in passing that the urgency of taking this testimony was not as great as is suggested by petitioner. If the master was unavailable, other witnesses could have proved what he testified to. The conference on board ship at which the definite decision not to proceed to New York was made was attended not merely by the master but also by the chief officer, the second officer, the chief engineer, and the purser (R. 81). The charter party was annexed to the libel and did not require proof by respondent. The bills of lading could have been proved by other witnesses.

Admittedly the purpose of taking the testimony of the master was to conserve that testimony for use as a defense on the *merits* of the case. It had nothing whatsoever to do with the challenge to the jurisdiction of the court.

Pretermitting the effect of filing claim and bond, the obtaining of the orders of extension, and the taking of testimony on the merits over libelants' objection, as a matter of law constituted a general appearance and was a waiver of the plea of sovereign immunity.

The SAO VICENTE, 281 Fed. 111, (2nd C. C. A., 1922). The Portuguese Steamship SAO VICENTE was libeled for a repair bill. Transportes Maritimos do Estado filed a claim for the vessel alleging itself to be its sole owner. The claim was in substantially the same form as that filed by the Republic of Peru in the *UCAYALI* case, both claims praying "to defend accordingly".

On the same day the Transportes Maritimos filed a bond for the release of the ship, in which the claimant and surety agreed to "abide by all orders of the court, interlocutory or final, and to pay the amount awarded by the final decree". The condition of this bond was identical with that of the bond filed by the Republic of Peru.

Later an answer was filed by the Vice-Consul General of Portugal, in which he alleged that the Transportes Maritimos, was a department of the government of Portugal. The answer then pleaded sovereign immunity. Libelant excepted to the answer and was sustained in its position.

The facts in the *SAO VICENTE* case are identical with those in the *UCAYALI* case, except that no mention was made of reservation of the plea of sovereign immunity in the claim and answer, and except that in the *UCAYALI* case, the Republic of Peru, in addition took testimony on

the merits, and obtained *ex parte* orders extending its time to plead. As we have indicated above, the attempted reservation of the plea of sovereign immunity does not help the Republic of Peru. It is actions and not words that count.

On appeal, the decision of the district court was affirmed, the Circuit Court of Appeals on the issue of waiver saying (page 114):

> "Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases, of ruling authority, which have now clearly held that the immunity of the sovereign, being susceptible of waiver, is lost when the sovereign enters a litigation with a general appearance. In Beers v. State of Arkansas, 20 How. 527, 15 L. Ed. 991, in speaking of the consent of the state of Arkansas, the court said:
>
> > " 'And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.'
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> "But this expression must be read in connection with the particular facts of that case, as is illustrated by the following extract from Clark v. Barnard, 108 U. S. 436, at page 447, 2 Sup. Ct. 878, at page 883 (27 L. Ed. 780):
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> > " 'The first question for determination on this appeal is that of jurisdiction raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the state of Rhode Island, on

the ground that the suit was in effect brought against a state by citizens of another state, contrary to the Eleventh Amendment to the Constitution of the United States. We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction, while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case the state of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claimed title. The case differs from that of Georgia v. Jesup, 106 U. S. 458, where the states expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court.'

"The underlying principle of Clark v. Barnard has been consistently followed. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 284-289, 26 Sup. Ct. 252, 50 L. Ed. 477; Porto Rico v. Ramos, 232 U. S. 627, 34 Sup.

Ct. 461, 58 L. Ed. 763; Richardson v. Fajardo Sugar Co., 241 U. S. 44, 36 Sup. Ct. 476, 60 L. Ed. 879; Veitia et al v. Fortuna Estates, 240 Fed. 256, 262, 153 C. C. A. 182. As succinctly put by Mr. Justice McKenna in the Ramos Case, supra:

> "'The immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step.'"

The SAO VICENTE, 295 Fed. 829 (3rd C. C. A., 1924). This was a libel against the Portuguese Steamship SAO VICENTE for salvage services. The pleading situation was identical with that in the case of the same name in the Second Circuit, *supra*. Again after the vessel was claimed and bonded, sovereign immunity was pleaded in the answer. The Circuit Court of Appeals for the Third Circuit said (page 831):

> "Exceptions by the libelant to the claimant's answer were sustained by the district court on the ground that the claimant had entered a general appearance, and, having submitted itself to the jurisdiction of the court, it thereby had waived any right to appear specially at that late day for the purpose of attacking its jurisdiction.
>
> "We think the court was right on two grounds: First, because a sovereign may waive its immunity, and it is considered to have done so when it has entered litigation with a general appearance and when, as here, it has acted for a time and in a manner entirely consistent with such an appearance. Beers v. Arkansas, 20 How. 527, 15 L. Ed. 991; Clark v. Barnard, 108 U. S. 436, 447, 2 Sup. Ct. 878, 883, 27 L. Ed.

780; Richardson v. Fajardo Sugar Co., 241 U. S. 44, 36 Sup. Ct. 476, 60 L. Ed. 879; Porto Rico v. Rosaly, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507; Porto Rico v. Ramos, 232 U. S. 627, 34 Sup. Ct. 461, 58 L. Ed. 763; Gunter v. Atlantic Coast Line, 200 U. S. 273, 284, 26 Sup. Ct. 262, 50 L. Ed. 477; The Sao Vicente (C. C. A.) 281 Fed. 111. We know of no more orderly way for a foreign government to consent to suit and submit to jurisdiction than by the voluntary act of entering a general appearance, and when this is followed by conduct permissible only under an appearance of that character, the sovereign must be held to have waived its immunity to suit. It will not suffice for it to change its attitude after the litigation is under way, * * *"

Petitioner remarks that in this case the court held that the procedure employed by the sovereign in making its plea for immunity was improper because it was made by the vice-consul general. This is beside the point. Both Circuit Courts of Appeals held that the filing of the claim and bond constituted a general appearance.

The MANGALIA, 1941 A. M. C. 1501 (commissioner's report); 1942 A. M. C. 35 (S. D. N. Y.). A libel for cargo damages was filed against the Roumanian Steamship MANGALIA. Through the vessel's agents counsel were employed on behalf of the Service Maritime Roumain, owners of the ship. Libelants took the testimony of the master of the MANGALIA. Proctors for the vessel cross-examined. The vessel's proctors made arrangements to release the vessel by the putting up of $26,000.00 in escrow in lieu of a release bond.

On the following day process in the suit was returnable, but was adjourned by consent of the proctors. The deposition of the chief officer was taken and he testified that the MANGALIA was owned by the Roumanian government. Later the proctors for the vessel were instructed to raise the question of sovereign immunity, which they did by special appearances thereafter filed.

Libelants contended that by the actions of the Service Maritime Roumain, through its counsel, the plea of sovereign immunity had been waived, and the court referred to a commissioner for determination, among other issues, that of waiver.

The commissioner found that Service Maritime Roumain, an agency of the Roumanian government, owned the vessel, and that there had been a waiver of sovereign immunity. We quote the syllabus *(1941 A. M. C. 1501)*:

> "After filing of a libel, the act of counsel for respondent or claimant in attending at the deposition of a witness and participating therein by putting cross-questions, and even more definitely the act of such counsel in taking the depositions of witnesses for the respondent or claimant amount to a general appearance for the respondent or claimant. It is too late thereafter to file a special appearance or to seek to claim that the respondent or claimant, as a foreign sovereign, is immune from process or suit."

He made the following conclusion of law (page 1503):

> "I advise the court that the suggestion of immunity herein has no bearing on the question of waiver, which is a matter for judicial determination."

Confirming the commissioner's report, the district judge said (1942 A. M. C. 35, 38):

> "A sovereign may waive immunity by acts or conduct inconsistent with a special appearance entered solely for the purpose of raising a jurisdictional issue if such acts or conduct spell out a general appearance. (Ervin vs. Quintanilla, 1938 A. M. C. 1459, 99 F. (2d) 935, cert. denied, 306 U. S. 635; Sao Vicente, 281 Fed. 111). The Commissioner has found as a fact that the acts of the proctors for the respondent constitute a general appearance and that 'having failed diligently to protect the defense of sovereign immunity and having actually proceeded with the defense on the merits', the respondent is bound by those acts since it has ratified them, thus waiving the defense of immunity."

The holding of the court was that the attendance of counsel at the taking of testimony and two appearances in court to request adjournment constituted a general appearance and a waiver of the plea of sovereign immunity. That there was no attempted reservation of the plea of sovereign immunity in connection with the taking of the testimony and the appearances in court is not an essential difference.

The UXMAL, 40 Fed. Sup. 258 (D. C. Mass., 1941). The Mexican SS UXMAL was libeled in a personal injury suit, and an Association that was operating the vessel for the government of Mexico secured her release on a stipulation and deposit of $7,500.00 whereby the Association submitted to the jurisdiction of the court and agreed to pay the amount of any final decree. About a year later the Mexican Ambassador filed a petition pleading sovereign

immunity. In denying the petition of the ambassador the court said (page 260):

> "In the case at bar, there was not only a general appearance by the Association, but it expressly submitted to the jurisdiction and entered into an engagement with libelant to pay whatever the court should decree in his favor out of the deposit. The Association having possession, and the right to operate the boat for its own purposes, was competent to waive immunity and submit to the jurisdiction of this court regardless of whether the Uxmal had the status of a public or private vessel. See Royal Italian Government v. National Brass & Copper Tube Co., 2 Cir., 294 F. 23, 27.

Nelson, Master, v. SS MUNWOOD and another case, 1925 A. M. C. 136 (S. D. N. Y.), holds that appearing and cross-examining a witness on the merits in the taking of depositions is a general appearance *notwithstanding a declaration by counsel that in so doing he appeared specially.* The court said (page 137):

> "Counsel for the owner of the Northern No. 30, however, appeared and cross-examined witnesses on the merits on the taking of depositions entitled in both causes, and also cross-examined Captain Nelson, on the merits on the taking of depositions noticed and entitled only in the cause of the Savannah Sugar Refining Corporation vs. The Munwood and Northern Transportation Company, Inc., always declaring that in doing so he appeared specially for such purpose and no other.
>
> "It, however, has been held that a general appearance is made by taking depositions to be used on the trial of a cause on the merits or by examining or

cross-examining witnesses on the merits. See 4 C. J. 1318, 1334.

"It has also been held that if the appearance is in effect general the fact that a party styles it a special appearance will not change its character and that an appearance for any purpose other than questioning the jurisdiction of the court is general and not special although accompanied by the claim that the appearance is only special, and that a defendant appearing specially must as a general rule keep out of the court for all other purposes. See 4 C. J. 1318."

Ervin v. Quintanilla, 99 F. (2d) 935 (C. C. A. 5th, 1938). We have already quoted from this case on other points. The court specifically recognized the principle that sovereign immunity may be waived by actions of respondent amounting to a general appearance.

The principal action of respondent there complained of was a "suggestion" filed by the Mexican Consul that depositions be not taken pending the determination of representations made to the State Department that the United States, through the Attorney General, should plead sovereign immuniy on behalf of the Mexican government. The court held that this did not amount to a general appearance, and said, page 939:

"The first appearance, to advise the court of the pendency of diplomatic representations, and to suggest that, pending same, depositions be not taken in the cause, was not a general appearance; indeed, it was within the authorities, perhaps not effective as an appearance at all. C/f Ex parte Muir, 254 U. S. 522; 41 S. Ct. 185, 65 L. Ed. 383; The Pesaro, 255 U. S. 216, 41 S. Ct. 308, 65 L. Ed. 592; Compania Espanola

De Navegacion, Maritima, S. A. v. The Navemar, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 677. It was more in the nature of a suggestion amicus curiae which the District Court was at complete liberty to and which it did disregard. Nothing in this suggestion was or could be taken as an invocation of, or a submission to, the jurisdiction of the court. All that it amounted to was an informal suggestion that, pending the diplomatic representations, the matter should proceed no further in the court."

This is an entirely different proposition from the actions taken in the *UCAYALI* case by the Republic of Peru.

We also cite the following cases:

Veitia v. Fortuna Estates, 240 Fed. 256, (C. C. A. 1, 1917).

United States v. New York & O. S. S. Co., Ltd., 216 Fed. 61 (C. C. A. 2, 1914); certiorari granted, 59 L. Ed. 1491, and dismissed on motion of Solicitor General, 59 L. Ed. 1504.

The Bee, Fed. Case No. 1219, 3 Fed. Cases 41 (D. C. Maine, 1836).

In *Sterling Tire Corporation v. Sullivan,* 279 Fed. 336 (C. C. A. 9th, 1922), an appearance by counsel to ask for a continuance was held to be a general appearance.

In *Everett Railway, L. & P. Co. v. United States,* 236 Fed. 806 (D. C. Wash., 1916), the United States, after a bill had been filed, on oral motion, obtained an order extending its time "in which to file herein its appearance, motion or answer". The court said, page 808:

"I think this case must be determined upon the fact as to whether the appearing in court by the de-

fendant and obtaining the order of enlargement of time to answer was the doing of an act in the progress of the cause, and therefore a general appearance and submission to the jurisdiction of the court. Appearance means the coming into court as a party in a proceeding and asking relief in the progress of the cause. Thompson v. Michigan Mutual Ben. Ass'n, 52 Mich. 522, 18 N. W. 247. A party may appear in person or by his agent. Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017. And if he does any act or asks any relief from which it may be presumed that he acknowledged the court's jurisdiction, his act is an appearance. Barbour v. Newkirk, 83 Ky. 529, 532. Obtaining an extension of time to plead, answer, demur, or to take such other action as it may be advised is equivalent to a general appearance." (Citing cases.)

In *Clark v. Southern Pacific Co.*, 175 Fed. 122 (W. D. Texas, 1909) the court held that the propounding of interrogatories and obtaining a commission to take testimony was a general appearance.

In *Murphy v. Herring, Hall, Marvin Safe Co.*, 184 Fed. 495, it was held that where the defendant's attorneys applied for and were granted an order extending the time to answer, appear, move, or otherwise plead to the complaint, such action constituted a general appearance. The court pointed out, in determining what a general appearance was, "the effect is not to be deduced from what the party may have intended, but from what he did. It is the act which speaks and not the secret purpose".

To the same effect see:

Zobel v. Zobel, 90 Pac. 171;
Briggs v. Stroud, 58 Fed. 717, (E. D. Wisc., 1893);
Hupfeld v. Automaton, 66 Fed. 788 at 789, (S. D. N. Y., 1895);
Feldman Inv. Co., v. Connecticut Life Ins. Co., 78 Fed. (2) 838, at 840, (C. C. A. 10th, 1935);
Hammond v. District Court, etc., 288 Pac. 758, 761, 30 N. M. 130, 39 A. L. R. 1490.

Petitioner cites and quotes from the case of *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54, in support of the proposition that an agreed postponement does not convert a special into a general appearance. That case is not in point. There the defendant, appearing specially, objected to the jurisdiction of the court over the defendant and moved to quash the attempted service of process. At the hour fixed for the hearing on this motion it was continued at the request of the *plaintiff*. This court found that this did not constitute a general appearance.

Petitioners refer to *Republic of Bolivia Explor. Syn.* (1914), 1 Ch. 139, and *The JASSY*, (1906), P. 270, 10 Asp. M. C. 278, as declaring the law of England to be that even a general appearance asking time to file evidence, filing evidence on the merits, and raising no question of privilege do not constitute a waiver of sovereign immunity. These authorities do not support this proposition. The *Republic of Bolivia* case involved a suit against a diplomatic agent accredited to the Crown of England, the Second Secretary of the Peruvian Legation. The case deals exclusively with *diplomatic* representatives. The court held that in England both under the common law and under the statute all

writs against foreign public ministers accredited to the Crown are absolutely null and void, and that further it was not satisfied that a subordinate secretary could waive his diplomatic privilege of immunity to suit without the sanction of his sovereign or legation.

In The JASSY a public vessel of the Roumanian government was seized and released on bail, an appearance being made in the case by solicitors. Sovereign immunity was held not waived thereby, because the action was taken without the knowledge or authority of the Roumanian government.

In the United States it is now settled that sovereign immunity will be waived by a general appearance or by acts or conduct inconsistent with the claim of a special appearance. *Porto Rico v. Ramos, supra; Ervin v. Quintanilla, supra;* and other cases cited under Point I.

JURISDICTION.

Petitioner attempts to invoke the jurisdiction of this court under 28 U. S. C. 342 (Judicial Code, Sec. 234) on the ground that the want of jurisdiction of the District Court over the Republic of Peru and the SS UCAYALI is so evident that a writ of prohibition should issue. From what we have said in this brief it is plain that this is a wholly unfounded and unwarranted assertion. Even in cases in which the jurisdiction of the District Court is doubtful, this court has generally exercised its discretion in favor of dismissing the petition for a writ of prohibition.

In Re Muir, 254 U. S. 522.
In Re Chicago, Rock Island & Pacific Ry. Co., 255 U. S. 273.

In the *Muir* case, *supra*, this court said (page 534):

"The power of this court, under sec. 234 of the Judicial Code, to issue writs of prohibition to the district courts, when proceeding as courts of admiralty, to prevent an unlawful assumption or exercise of jurisdiction, is not debatable. But this power, like others, is to be exerted in accordance with principles which are well settled. In some instances, as where the absence of jurisdiction is plain, the writ goes as a matter of right. Ex parte Phenix Ins. Co. 118 U. S. 610, 626, 30 L. Ed. 274, 280, 7 Sup. Ct. Rep. 215; Ex parte Indiana Transp. Co. 244 U. S. 456, 61 L. Ed. 1253, 37 Sup. Ct. Rep. 717. In others, as where the existence or absence of jurisdiction is in doubt, the granting or refusal of the writ is discretionary. Re Cooper, 143 U. S. 472, 485, 36 L. Ed. 232, 12 Sup. Ct. Rep. 453; Re New York & P. R. S. S. Co. 155 U. S. 523, 531, 39 L. Ed. 246, 249, 15 Sup. Ct. Rep. 183; Re Alix, 166 U. S. 136, 41 L. Ed. 948, 17 Sup. Ct. Rep. 522. And see Ex parte Gordon, 104 U. S. 515, 518, 519, 26 L. Ed. 814, 815; The Charkieh, L. R. 8 Q. B. 197, 42 L. J. Q. B. N. S. 75, 28 L. T. N. S. 190, 21 Week. Rep. 437.

"Here the most that can be said against the District Court's jurisdiction is that it is in doubt; and in other respects the situation is such that we deem it a proper exercise of discretion to refuse the writ. Nothing need be added to show that the request for a writ of mandamus is on no better footing. Re Morrison 147 U. S. 14, 26, 27, 37 L. Ed. 60, 65, 13 Sup. Ct. Rep. 246; Re Oklahoma, 220 U. S. 191, 209, 55 L. Ed. 431, 435, 31 Sup. Ct. Rep. 426; Ex parte Roe, 234 U. S. 70, 58 L. Ed. 1217, 34 Sup. Ct. Rep. 722.

"Rule discharged and petition dismissed."

In *In Re Chicago, Rock Island & Pacific Ry. Co., supra,* this court reaffirmed the principles laid down in the Muir decision and dismissed the petition for writs. Is said (page 279):

> "The most that can be said against the district court's jurisdiction is that it is in doubt. And the return recites that the order which declared that the Rock Island became a party rests upon evidence which has not been embodied in the record. The immunity of the Rock Island from suit in the northern district of Ohio, conferred by sec. 51 of the Judicial Code, could be waived (Re Moore, 209 U. S. 490, 52 L. Ed. 901, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164); and ordinarily a general appearance operates as a waiver (Gracie v. Palmer, 8 Wheat. 699, 5 L. Ed. 719). The district court obviously had jurisdiction to determine, in the first instance, whether the Rock Island had entered a general appearance. Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935."

The correctness of the decision of the district judge in determining that the actions of the Republic of Peru constituted a general appearance and a waiver of the plea of sovereign immunity is so clear that it appears to us that this court should exercise its discretion in favor of dismissing the petition. The most that can be said is that the jurisdiction of this court to entertain this proceeding is discretionary. If, because a friendly foreign sovereign is involved and it is thought desirable that the issue of waiver be finally determined now, this court is inclined to exercise its discretion in favor of considering the merits of the petition, we shall interpose no objection.

It would appear from *Muir v. Chatfield*, (C. C. A. 2) 225 Fed. 24, that this application for writs if made to the United States Circuit Court of Appeals would have been refused.

CONCLUSION.

It appears to be the contention of the petitioner in its brief that because the claim of immunity of the SS UCAYALI has been recognized and allowed by the State Department and because appropriate suggestions were made by the Department of Justice to the District Court, that that court should have regarded the matter as having been settled by the Executive Department and should have disregarded any plea of waiver based on the Republic of Peru's actions in court. This confuses the executive and judicial functions. When the Executive Department recognizes and allows a claim of sovereign immunity and appropriate representations are then made by the Executive Department, to the court, it appears that the court must accept those representations on that issue as conclusive; but the question whether the sovereign prior to the filing of the plea of sovereign immunity has by his actions in court made a general appearance is one for judicial determination. As was said by the commissioner and approved by the court in *The MANGALIA supra*, "The suggestion of immunity herein has no bearing on the question of waiver, which is a matter for judicial determination." The court and the court alone has the right and duty to determine whether the Republic of Peru by invoking the power of the court has made a general ap-

pearance and has thus waived its sovereign immunity. *In Re Chicago, Rock Island & Pac. Ry. Co., supra.* The Republic of Peru, notwithstanding the good neighbor policy, is not entitled to receive in courts of the United States any rights or privileges beyond those which would be accorded to any friendly sovereign. If, like the government of Porto Rico in *Porto Rico v. Ramos, supra,* or the Republic of Portugal in the *SAO VICENTE* cases, *supra,* or the Kingdom of Roumania (then not an enemy), in the *MANGALIA* case, *supra,* or the Republic of Mexico in the *UXMAL* case, *supra,* the Republic of Peru in this case has by its actions made a general appearance, it must bear the legal consequences. The good neighbor policy has no place in this litigation.

In a case of this character it must be kept in mind that a contention that a vessel is immune from jurisdiction amounts to an assertion of an exception to the general rule, which is that when a merchant vessel of a foreign nation enters our waters, she submits herself to the jurisdiction of our courts. When libelant filed its libel against the UCAYALI, it was asserting a well established property right against that vessel and should not be deprived of that right except on the clearest proof that the vessel and her claimant are entitled to sovereign immunity, and that the plea of sovereign immunity has not been waived. Any doubts should be resolved against the vessel. As was said in *In Re Muir,* 254 U. S. 522, "*prima facie* the District Court had jurisdiction of the suit and the vessel, and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion". The UCAYALI had contracted to carry

libelant's cargo of sugar to New York. Because of fears of submarines on the Atlantic Coast, the master, officers, and crew of the UCAYALI refused to go to New York. The vessel then proceeded to New Orleans. By the delivery of the sugar at New Orleans libelant alleges that it has sustained damages in excess of $60,000.00. If a plea of sovereign immunity is maintained and is held not waived, libelant will be without remedy for its wrongs.

The decision of the District Judge was right. The rule should be discharged and the petition for a writ of prohibition and/or mandamus should be dismissed.

Respectfully submitted,

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February 18, 1943.

pp. 4+6 - Frankfurter J. opinion.

SUPREME COURT OF THE UNITED STATES.

No. 13, Original.—OCTOBER TERM, 1942.

Ex parte Republic of Peru, owner of the Peruvian Steamship "Ucayali".

On Motion for Leave to File Petition for a Writ of Prohibition and/or a Writ of Mandamus.

[April 5, 1943.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a motion for leave to file in this Court the petition of the Republic of Peru for a writ of prohibition or of mandamus. The petition asks this Court to prohibit respondent, a judge of the District Court for the Eastern District of Louisiana, and the other judges and officers of that court, from further exercise of jurisdiction over a proceeding *in rem*, pending in that court against petitioner's steamship *Ucayali*, and to direct the district judge to enter an order in the proceeding declaring the vessel immune from suit. The questions for decision here are whether this Court has jurisdiction to issue the writ, whether such jurisdiction should in our discretion be exercised in petitioner's behalf, and whether petitioner's appearance and defense of the suit in the district court was, as that court has ruled, a waiver of its claim that the vessel, being that of a friendly sovereign state, is immune from suit brought by a private party in the court of the United States.

On March 30, 1942, Galban Lobo Co., S. A., a Cuban corporation, filed a libel in the district court against the *Ucayali* for its failure to carry a cargo of sugar from a Peruvian port to New York, as required by the terms of a charter party entered into by libelant with a Peruvian corporation acting as agent in behalf of the Peruvian Government. On April 9, 1942, the Republic of Peru, acting by the master of the vessel, intervened in the district court by filing a claim to the vessel, averring that the Republic of Peru was sole owner, and stating: "The filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant, particularly, but not exclusively, sovereign immunity".

On the same day petitioner procured the release of the vessel by filing a surety release bond in the sum of $60,000, on which petitioner was principal. The bond, which contained a reservation identical with that appearing in petitioner's claim to the vessel, was conditioned upon payment of any amount awarded to libelant by the final decree in the cause. On April 11th petitioner proceeded in the cause to take the testimony of the master on the merits, and spread on the record a statement that the testimony was taken with like "full reservation and without waiver of all defenses and objections which may be available to respondent claimant, particularly, but not exclusively, sovereign immunity". Petitioner also stated that "the appearance of counsel for the Government of Peru and the Steamship *Ucayali* is for the special purpose only of taking the testimony of the master under the reservation aforesaid".

On April 18th, and again on May 10th and on May 29th, petitioner moved for and obtained an order of the district court extending its time within which to answer or otherwise plead to the libel. Each motion was made "with full reservation and without waiver of any defenses and objections which may be available to mover, particularly, but not exclusively, sovereign immunity".

In the meantime petitioner, following the accepted course of procedure (see *Ex parte Muir*, 254 U. S. 522; *The Navemar*, 303 U. S. 68), by appropriate representations, sought recognition by the State Department of petitioner's claim of immunity, and asked that the Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the Eastern District of Louisiana to file in the district court the appropriate suggestion of immunity of the vessel from suit. These negotiations resulted in formal recognition by the State Department of the claim of immunity. This was communicated to the Attorney General by the Under Secretary's letter of May 5, 1942. The letter requested him to instruct the United States Attorney to present to the district court a copy of the Ambassador's formal claim of immunity filed with the State Department, and to say that "this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali*, and recognizes and allows the claim of immunity".

Pursuant to these instructions the United States Attorney, on June 29th, filed in the district court a formal statement advising the court of the proceedings and communications mentioned, suggesting to the court and praying "that the claim of immunity made

on behalf of the said Peruvian Steamship *Ucayali* and recognized and allowed by the State Department be given full force and effect by this court"; and "that the said vessel proceeded against herein be declared immune from the jurisdiction and process of this court". On July 1st petitioner moved for release of the vessel and that the suit be dismissed. The district court denied the motion on the ground that petitioner had waived its immunity by applying for extensions of time within which to answer, and by taking the deposition of the master—steps which the district court thought constituted a general appearance despite petitioner's attempted reservation of its right to assert its immunity as a defense in the suit. — F. Supp. —.

The first question for our consideration is that of our jurisdiction. Section 13 of the Judiciary Act of 1789, 1 Stat. 81, conferred upon this Court "power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States". And § 14 provided that this Court and other federal courts "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law". 1 Stat. 81. These provisions have in substance been carried over into §§ 234 and 262 of the Judicial Code (28 U. S. C. §§ 342, 377), and § 751 of the Revised Statutes (28 U. S. C. § 451).

The jurisdiction of this Court as defined in Article III, § 2, of the Constitution is either "original" or "appellate". Suits brought in the district courts of the United States, not of such character as to be within the original jurisdiction of this Court under the Constitution, are cognizable by it only in the exercise of its appellate jurisdiction. Hence its statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction. *Marbury* v. *Madison,* 1 Cranch 137, 173-80; *Ex parte Siebold,* 100 U. S. 371, 374-75.

Under the statutory provisions, the jurisdiction of this Court to issue common law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior

court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when directed by this Court to district courts, both before the Judiciary Act of 1925, 43 Stat. 936,[1] and since.[2] In all these cases (cited in notes 1 and 2), the appellate, not the original, jurisdiction of this Court was invoked and exercised.[3]

The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the Court, *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95-96; *Ex parte City of Monterey*, 269 U. S. 527; *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9, 29; *United States* v. *Dern*, 289 U. S. 352, 359, and are usually denied where other adequate remedy is available. *Ex parte Baldwin*, 291 U. S. 610. And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Mfg. Co.*, 274 U. S. 725; *Ex parte Daugh-*

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[1] E. g., Ex parte State of New York, No. 1, 256 U. S. 490; The Western Maid, 257 U. S. 419; Ex parte Simons, 247 U. S. 231; Ex parte Peterson, 253 U. S. 300, 305; Ex parte Hudgings, 249 U. S. 378; Ex parte Uppercu, 239 U. S. 435; Matter of Heff, 197 U. S. 488; Ex parte Siebold, 100 U. S. 371; Ex parte Watkins, 3 Pet. 193; United States *v.* Peters, 3 Dall. 121.

[2] Ex parte United States, 287 U. S. 241; Maryland *v.* Soper (No. 1), 270 U. S. 9, 27-28; Maryland *v.* Soper (No. 2), 270 U. S. 36; Maryland *v.* Soper (No. 3), 270 U. S. 44; Colorado *v.* Symes, 286 U. S. 510; McCullough *v.* Cosgrave, 309 U. S. 634; Ex parte Kawato, 317 U. S. 69; see Los Angeles Brush Corp. *v.* James, 272 U. S. 701.

[3] See particularly the discussion in Maryland *v.* Soper (No. 1), 270 U. S. 9, 28-30, and in Ex parte United States, 287 U. S. 241. Compare Ex parte Siebold, 100 U. S. 371.

Ex parte United States, *supra*, was not and could not have been a case of original jurisdiction. The Constitution confers original jurisdiction only in cases affecting ambassadors, other public ministers and consuls, and "those in which a State shall be Party" (Art. III, § 2, cl. 2). No state was made a party to Ex parte United States. The United States has never been held to be a "State" within this provision—and it obviously is not—nor has it any standing to bring an original action in this Court which does not otherwise come within one of the provisions of Article III, § 2, cl. 2. United States *v.* Texas, 143 U. S. 621, relied upon to sustain a different view, was within the original jurisdiction because the state of Texas was the party defendant. And until now it has never been suggested that necessity, however great, warrants the exercise by this Court of original jurisdiction which the Constitution has not conferred upon it. Moreover, even if Congress had withdrawn this Court's appellate jurisdiction by the 1925 Act, there would have been no necessity in Ex parte United States for inventing an original jurisdiction which the Constitution had withheld, since a writ of mandamus could have been applied for in the circuit court of appeals.

erty, 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533), which likewise has power under § 262 of the Judicial Code to issue the writ. *McClellan* v. *Carland*, 217 U. S. 268; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269.

After a full review of the traditional use of the common law writs by this Court, and in issuing a writ of mandamus, in aid of its appellate jurisdiction, to compel a district judge to issue a bench warrant in conformity to statutory requirements, this Court declared in *Ex parte United States*, 287 U. S. 241, 248-49: "The rule deducible from the later decisions, and which we now affirm, is, that this Court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this Court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this Court as the court of ultimate review only in such exceptional cases."[4]

We conclude that we have jurisdiction to issue the writ as prayed. And we think that—unless the sovereign immunity has been waived—the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit court of appeals, from which it might be necessary to bring

[4] The suggestion that the Judiciary Act of 1925 was intended to curtail the jurisdiction previously exercised by this Court in granting such writs to the district courts finds no support in the history or language of the Act. The Act was originally prepared by a committee of justices of this Court, by whom it was submitted to Congress for consideration. Four members of this Court gave testimony before Congressional committees in explanation of the purposes and meaning of the Act, and Chief Justice Taft submitted a detailed statement of the changes which the Act would effect. These disclose that the great purpose of the Act was to curtail the Court's obligatory jurisdiction by substituting, for the appeal as of right, discretionary review by certiorari in many classes of cases. In all the oral and written submissions by members of this Court, and in the reports of the committees of Congress which recommended adoption of the bill, there is not a single suggestion that the Act would withdraw or limit the Court's existing jurisdiction to direct the common law writs to the district courts when, in the exercise of its discretion, it deemed such a remedy appropriate. [See Résumé, together with Citations Affecting Sections of Senate Bill 3164, submitted by Chief Justice Taft, printed for use of Senate Committee on the Judiciary, 67th Cong., 2d Sess.; Hearing on S. 2060 and S. 2061, before a Subcommittee of the Senate Committee on the Judiciary, Feb. 2, 1924, 68th Cong., 1st Sess.; Hearing on H. R. 8206 before House Committee on the Judiciary, Dec. 18, 1924, 68th Cong., 2d Sess.; S. Rep. No.

the case to this Court again by certiorari. The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State. When the Secretary elects, as he may and as he appears to have done in this case, to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court. If the Republic of Peru has not waived its immunity, we think that there are persuasive grounds for exercising our jurisdiction to issue the writ in this case and at this time without requiring petitioner to apply to the circuit court of appeals, and that those grounds are at least as strong and urgent as those found sufficient in *Ex parte United States*, in *Maryland* v. *Soper*, in *Colorado* v. *Symes*, and in *McCul-*

362, 68th Cong., 1st Sess.; H. Rep. No. 1075, 68th Cong., 2d Sess.] The changes in existing law proposed to be made by the Act were set forth with painstaking detail. It is hardly conceivable that the justices of this Court, fully familiar with its practice, would have left unexpressed an intention—had such intention really existed—to curtail drastically a jurisdiction which the Court had exercised under statutory authority from the beginning of its history. Ex parte United States, and most of the other cases cited in note 2, *supra*, were decided at a time when members of the Court's committee responsible for the 1925 Act were still members of the Court. The Court's unanimous concurrence in the existence of its jurisdiction in the cases subsequent to the 1925 Act establishes a practice (cf. Stuart *v.* Laird, 1 Cranch 299, 309) which would be beyond explanation if there had been any thought that any provision of the Act had placed such a restriction on the Court's jurisdiction to issue the writs.

Nor can it be said that this legislative history gives any support to the suggestion that the failure of the 1925 Act to cut off the jurisdiction of this Court to issue the common law writs to district courts was inadvertent, and that the Act should therefore be construed as though it had done what it failed to do. The jurisdiction of this Court to issue such writs, like its jurisdiction to grant certiorari, is discretionary. The definite aim of the 1925 Act was to enlarge, not to destroy, the Court's discretionary jurisdiction. That aim can hardly give rise to an inference of an unexpressed purpose to amend or repeal the statutes of the United States conferring jurisdiction on the Court to issue the writs, or an inference that such would have been the purpose had repeal been proposed. The exercise of that jurisdiction has placed no undue burden on this Court. It is significant that, since 1925, less than ten of the numerous applications to this Court for such writs have been granted. Only in rare instances has their denial been the occasion for an opinion dealing with questions of public importance. See, e. g., Los Angeles Brush Corp. *v.* James, 272 U. S. 701; Ex parte Baldwin, 291 U. S. 610; Ex parte Colonna, 314 U. S. 510; cf. Mooney *v.* Holohan, 294 U. S. 103. And whatever the scope of the jurisdiction of this Court, in no case does it decline to examine an application in order to determine whether it has jurisdiction.

lough v. *Cosgrave*, all *supra*, note 2. We accordingly pass to the question whether petitioner has waived his immunity.

This case presents no question of the jurisdiction of the district court over the person of a defendant. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance or participation in the litigation. Here the district court acquired jurisdiction *in rem* by the seizure and control of the vessel, and the libelant's claim against the vessel constituted a case or controversy which the court had authority to decide. Indeed, for the purpose of determining whether petitioner was entitled to the claimed immunity, the district court, in the absence of recognition of the immunity by the Department of State, had authority to decide for itself whether all the requisites for such immunity existed—whether the vessel when seized was petitioner's, and was of a character entitling it to the immunity. See *Ex parte Muir, supra; The Pesaro*, 255 U. S. 216; *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562; *The Navemar, supra*. Therefore the question which we must decide is not whether there was jurisdiction in the district court, acquired by the appearance of petitioner, but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law.

That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction". *United States* v. *Lee*, 106 U. S. 196, 209. More specifically, the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune. When such a seizure occurs the friendly foreign sovereign may present its claim of immunity by appearance in the suit and by way of defense to the libel. *The Navemar, supra*, 74 and cases cited; *Ex parte Muir, supra*. But it may also present its claim to the Department of State, the political arm of the Government charged with the conduct of our foreign affairs. Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel

and remit the libelant to the relief obtainable through diplomatic negotiations. *The Navemar, supra,* 74; *The Exchange,* 7. Cranch 116. This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.

We cannot say that the Republic of Peru has waived its immunity. It has consistently declared its reliance on the immunity, both before the Department and in the district court. Neither method of asserting the immunity is incompatible with the other. Nor, in view of the purpose to be achieved by permitting the immunity to be asserted, are we able to perceive any ground for saying that the district court should disregard the claim of immunity, which a friendly sovereign is authorized to advance by way of defense in the pending suit, merely because the sovereign has seen fit to preserve its right to interpose other defenses. The evil consequences which might follow the seizure of the vessel are not any the less because the friendly state asserts other grounds for the vessel's release.

Here the State Department has not left the Republic of Peru to intervene in the litigation through its Ambassador as in the case of *The Navemar.* The Department has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause. We have no occasion to decide whether the court should surrender the vessel and dismiss the suit on certification of sovereign immunity by the Secretary, made after the friendly sovereign has once unqualifiedly assented to a judicial determination of the controversy.

The motion for leave to file is granted. We assume that, in view of this opinion, formal issuance of the writ will be unnecessary, and we direct that the writ issue only on further application by the petitioner.

Mr. Justice ROBERTS concurs in the result.

SUPREME COURT OF THE UNITED STATES.

No. —, Original.—October Term, 1942.

Ex parte Republic of Peru, owner of the Peruvian Steamship "Ucayali".

On Motion for Leave to File Petition for a Writ of Prohibition and/or a Writ of Mandamus.

[April 5, 1943.]

Mr. Justice Frankfurter, dissenting.

If due regard be had for its aims, the Judiciary Act of 1925, 43 Stat. 936, denies us, in my opinion, the power to review the action in this case of the District Court for the Eastern District of Louisiana, even though such review is cast in form of a writ of prohibition or of mandamus. But, even assuming we have discretionary power to issue such writs to a district court, we should in the circumstances of this case abstain from exercising that power in view of the absence of any showing that relief equally prompt and effective and consonant with the national interest was not, and is not, available in the appropriate Circuit Court of Appeals.

The range of cases that may be brought here directly from the district courts and the rigor with which we limit our discretionary jurisdiction determine the capacity of this Court adequately to discharge its essential functions. I shall therefore briefly state the grounds for believing that this case is improperly here, that the rule should be discharged, and the motion for leave to file the petition be denied. I put to one side the relation of the Peruvian Ambassador to this litigation. This is not a proceeding falling under the rubric "Cases affecting Ambassadors" and thereby giving us original jurisdiction. My brethren do not so treat it, and our common starting point is that in taking hold of this case the Court is exercising its appellate jurisdiction.

We are also agreed that this Court "can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress". *Amer. Const. Co.* v. *Jack-*

sonville Railway, 148 U. S. 372, 378. Had this case arisen under the Evarts Act (Act of March 3, 1891, 26 Stat. 826), appeal could have been taken from the district court, since its jurisdiction was in issue, directly to this Court without going to the Circuit Court of Appeals. See, *e. g., Wilson* v. *Republic Iron Co.;* 257 U. S. 92. And since the case would have been within the immediate appellate jurisdiction of this Court, §§ 13 and 14 of the first Judiciary Act, 1 Stat. 73, 80-82 (now 28 U. S. C. §§ 342, 377, 451), would have authorized this Court to issue an appropriate writ to prevent frustration of its appellate power, see *Ex parte Crane,* 5 Pet. 190, or have enabled it to accelerate its own undoubted reviewing authority where, under very exceptional circumstances, actual and not undefined interests of justice so required. Compare *In re Chetwood,* 165 U. S. 443; *Whitney* v. *Dick,* 202 U. S. 132; *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269.

The power to issue these auxiliary writs is not a qualification or even a loose construction of the strict limits, defined by the Constitution and the Congress, within which this Court must move in reviewing decisions of lower courts. There have been occasional, but not many, deviations from the true doctrine in employing these auxiliary writs as incidental to the right granted by Congress to this Court to review litigation, in aid of which it may become necessary to issue a facilitating writ. The issuance of such a writ is, in effect, an anticipatory review of a case that can in due course come here directly. When the Act of 1891 established the intermediate courts of appeals and gave to them a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court, the philosophy and practice of federal appellate jurisdiction came under careful scrutiny. This Court uniformly and without dissent held that it was without power to issue a writ of mandamus in a case in which it did not otherwise have appellate jurisdiction. *In re Massachusetts,* 197 U. S. 482, and *In re Glaser,* 198 U. S. 171. In these cases rules were discharged because, under the Circuit Courts of Appeals Act, appeals could not be brought directly to the Supreme Court but would have to go to the Circuit Court of Appeals, and only thereafter could they come here, if at all, through certiorari. But review could be brought directly to this Court of cases in which the jurisdiction of the district court was in issue, and therefore writs of "prohibition or mandamus or certiorari as ancillary thereto", *In re*

Massachusetts, supra at 488, were available. Cases which came here directly, prior to the Judiciary Act of February 13, 1925, 43 Stat. 936, to review the jurisdiction of the district courts, whether on appeal or through the informal procedure of auxiliary writs, are therefore not relevant precedents for the present case.

The Judiciary Act of 1925 was aimed to extend the Court's control over its business by curtailing its appellate jurisdiction drastically. Relief was given by Congress to enable this Court to discharge its indispensable functions of interpreting the Constitution and preserving uniformity of decision among the eleven intermediate courts of appeals. Periodically since the Civil War—to speak only of recent times—the prodigal scope of the appellate jurisdiction of this Court brought more cases here than even the most competent tribunal could wisely and promptly adjudicate. Arrears became inevitable until, after a long legislative travail, the establishment in 1891 of intermediate appellate tribunals freed this Court of a large volume of business. By 1916 Congress had to erect a further dam against access to this Court of litigation that already had been through two lower courts and was not of a nature calling for the judgment of the Supreme Court. Act of September 6, 1916, 39 Stat. 726. But the increase of business—the inevitable aftermath of the Great War and of renewed legislative activity—soon caught up with the meager relief afforded by the Act of 1916. The old evils of an overburdened docket reappeared. Absorption of the appellate jurisdiction of the Supreme Court by cases that should have gone to, or been left with, the circuit courts of appeals resulted in unjustifiable subordination of the national interests in the special keeping of this Court. To be sure, the situation was not as bad as that which called the circuit courts of appeals into being. In the eighties three to four years elapsed between the docketing and the hearing of a case. But it was bad enough. In 1922 Chief Justice Taft reported to Congress that it took from fifteen to eighteen months for a case to reach argument.

The needless clog on the Court's proper business came from two sources. More than a dozen classes of cases could have a second review in the Supreme Court, as a matter of right, after an unsuccessful appeal in the circuit courts of appeals. With a single exception all adjudications by the circuit courts of appeals were by the Act of 1925 made reviewable only by the discretionary writ of certiorari. But no less prolific a source of mischief in the

practical application of the appellate jurisdiction of the Supreme Court prior to the Act of 1925, was the right to bring cases directly to this Court from the district courts. According to the figures submitted to Congress in support of the need for the 1925 legislation, one-sixth of the total business of the Supreme Court came directly from the district courts. (Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate, 68th Cong., 1st Sess., on S. 2060 and S. 2061, pp. 32-33, 44-45.) Most of these cases presented phases of the general question now before us, namely, the right of a district court to adjudicate. The obvious remedy for this unwarranted direct review of courts of first instance was to shut off direct access from the district courts to this Court. That is exactly what was proposed. In the language of the chief spokesman before the judiciary Committees, "Section 238 as amended and reenacted in the bill would permit cases falling within four particular classes, and those only, to come from the district courts directly to the Supreme Court. . . . Apart from cases within these four classes, the bill provides that the immediate review of all decisions in the district courts shall be in the circuit courts of appeals. We regard this as the better course and calculated to promote the public interest." *Ibid.*, 33-34. This conception of "the public interest" was translated into law, except that in one additional class of cases direct review was allowed from the district courts to this Court. Suffice it to say that the five ~~accepted~~ excepted categories are not in serious derogation of the wise requirement that review of action by the district courts belongs to the circuit courts of appeals. All five either involve litigation before a district court composed of three judges, or ordinarily touch matters of national concern.

The present power of this Court to review directly decisions of district courts must be determined by the restrictions Congress imposed in the Act of 1925. The language of that section is significant:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, *and not otherwise.* . . ." (43 Stat. 936, 938—italics provided.)

This case does not fall even remotely within any of these five Acts.[1] We have thus been given no appellate jurisdiction over this

[1] "SEC. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

controversy, but by resort to so-called ancillary writs we are exercising appellate jurisdiction here. On principle, it is still as true as it was held to be in *In re Massachusetts, supra,* and *In re Glaser, supra,* that "in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus . . . as ancillary thereto". 197 U. S. 482, 488. This does not imply that by indirection the Act of 1925 repealed what were originally §§ 13 and 14 of the Judiciary Act of 1789, on which, in their present form in the United States Code (28 U. S. C. §§ 342, 377, 451), the Court relies. The new distribution of appellate jurisdiction between the Supreme Court and the circuit courts of appeals did not repeal these old provisions. It does, however, call for restriction of their application in harmony with this new distribution. Ancillary writs are still available both for the circuit courts of appeals and this Court when they may in fact be ancillary to a main suit. See *Ex parte Kawato,* 316 U. S. 650, 317 U. S. 69, 71 (leave to file petition for writ of mandamus granted after such leave was denied by the Circuit Court of Appeals); and *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269. But when we cannot have jurisdiction in a case on appeal, no proceeding can be ancillary to it.

I am not unmindful that the hearings on the Judiciary Act of 1925 before the Committees of Congress are completely silent regarding the appellate jurisdiction of this Court through use of ancillary writs. But it would not be the first time in the history of

(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

(2) The Act of March 2, 1907, 'providing for writs of error in certain instances in criminal cases' where the decision of the district court is adverse to the United States.

(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 316 of "An Act to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products, and eggs, and for other purposes' approved August 15, 1921." 43 Stat. 936, 938.

judiciary legislation that eminent jurisdictional authorities and expert draftsmen, preoccupied with major problems in a large scheme for relieving this Court of undue business, have been forgetful of minor aspects of jurisdiction. For instance, it took six years to deal with the implications overlooked by Senator Evarts in using the phrase "infamous crimes" in the Act of 1891. (See *In re Claasen,* 140 U. S. 200, and H. Rep. No. 666, 54th Cong., 1st Sess., the letter of Chief Justice Fuller to Senator Hoar in 23 Cong. Rec. 3285-86, Report of Attorney General Olney for 1893, xxv, and the Act of January 20, 1897, 29 Stat. 492.) Legislation by even the most competent hands, like other forms of composition, is subject to the frailties of the imagination. Concentration on the basic aims of a reform like the Act of 1925 inevitably overlooks lacunae and ambiguities which the future reveals and which the future must correct. The Act of 1925, despite its deft authorship, soon revealed such ambiguities. See the series of cases collected in *Phillips* v. *United States,* 312 U. S. 246, 250-51. They were resolved by faithful enforcement of the central purpose of the Act of February 13, 1925, which was "to keep within narrow confines our appellate docket", 312 U. S. at 250. For more than half a century the desire of Congress to cut down the appellate jurisdiction of this Court has been given effect in a variety of situations even though Congress did not adequately express such purpose. See, for instance, *McLish* v. *Roff,* 141 U. S. 661; *Robinson* v. *Caldwell,* 165 U. S. 359; *America Sugar Refining Co.* v. *New Orleans,* 181 U. S. 277; *American Security Co.* v. *Dist. of Columbia,* 224 U. S. 491; *Inter-Island Steam Nav. Co.* v. *Ward,* 242 U. S. 1.

Finally, it is urged that practice since the Judicial Act of 1925 sanctions the present assumption of jurisdiction. Cases like *Ex parte Northern Pac. R. Co.,* 280 U. S. 142, ordering a district judge to summon three judges to hear a suit under § 266 of the Judicial Code (28 U. S. C. § 380), must be put to one side. This is one of the excepted classes under the Act of 1925 in which direct review lies from a district court to the Supreme Court, and it is therefore an orthodox utilization of an ancillary writ within the rule of *In re Massachusetts, supra.* Of all the other cases in which, since the Act of 1925, a writ was authorized to be issued, none is comparable to the circumstances of the present case. In one, *Ex parte Kawato, supra,* the appellate jurisdiction of this Court was invoked only after it was denied by a circuit court of appeals. Another, *Ex parte United States,* 287 U. S. 241, while in form a review of action

by a district court, was in fact an independent suit by the United States because no appeal as such lay from the refusal of the district judge in that case to issue a bench warrant in denial of his duty. If the suit was a justiciable controversy through use of the ancillary writ, it was equally justiciable if regarded as an original suit by the United States. While, to be sure, it was not formally such, and while an ordinary suit by the United States to enforce an obligation against one of its citizens properly cannot be brought within the original jurisdiction of this Court, *Ex parte United States, supra,* was quite different. There the United States sought enforcement of a public duty for which no redress could be had in any other court. Therefore, the considerations which led this Court in *United States* v. *Texas,* 143 U. S. 621, to allow the United States to initiate an original suit in this Court, although the merely literal language of the Constitution precluded it (as the dissent in that case insisted), might have been equally potent to allow assumption of such jurisdiction in the circumstances of *Ex parte United States.* But, in any event, merely because there is no other available judicial relief is no reason for taking appellate jurisdiction. For some situations the only appropriate remedy is corrective legislation. Of the same nature were four other cases, three suits by Maryland and one by Colorado. *Maryland* v. *Soper* (1), 270 U. S. 9; *Maryland* v. *Soper* (2), 270 U. S. 36; *Maryland* v. *Soper* (3), 270 U. S. 44; *Colorado* v. *Symes,* 286 U. S. 510. These cases were not ordinary claims by a state against one of its citizens for which the state courts are the appropriate tribunals, see *California* v. *Southern Pacific Co.,* 157 U. S. 229. They were in effect suits by states against federal functionaries in situations in which the citizenship of these functionaries was irrelevant to the controversy. And so the considerations that made the controversies by Maryland and Colorado justiciable through ancillary writs might have been equally relevant in establishing justiciability for original suits in this Court under Article III, Section 2. It is not without significance that the *Maryland* v. *Soper* cases and *Colorado* v. *Symes,* which the Court now regards as precedents for the ruling in *Ex parte United States,* were not even referred to in the opinion in the latter case.

If *Ex parte United States,* the *Maryland* v. *Soper* cases, and *Colorado* v. *Symes, supra,* are not to be supported on the basis of their peculiar circumstances which might have justified the Court in assuming jurisdiction, they should be candidly regarded as

deviations from the narrow limits within which our appellate jurisdiction should move. They would then belong with the occasional lapses which occur when technical questions of jurisdiction are not properly presented to the Court and consciously met. That leaves two other cases, *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701, and *McCullough* v. *Cosgrave,* 309 U. S. 634. In the *Los Angeles Brush* case, the Court explicitly refused to invoke authority to issue an ancilliary writ inasmuch as the appellate jurisdiction of the controversy belonged to the Circuit Court of Appeals and not to this Court. The case concerned "the enforcement of the Equity Rules", 272 U. S. at 706, and the power which this Court recognized in that case was part of the duty imposed upon the Court by Congress to formulate and put in force the Equity Rules. The *McCullough* case was equally restricted. It merely followed the *Los Angeles Brush* case in enforcing the Equity Rules.

To be sure, *Ex parte United States, supra,* stated that later cases had qualified *In re Massachusetts* and *In re Glaser, supra.* But the cases that were avouched (*McClellan* v. *Carland,* 217 U. S. 268; *Ex parte Abdu,* 247 U. S. 27) in no wise called into question *In re Massachusetts* and *In re Glaser,* and the actual decisions left them intact. The authority of *In re Massachusetts, supra,* and *In re Glaser, supra,* was unquestioned as late as 1923, in *Magnum Co.* v. *Coty,* 262 U. S. 159, after, that is, the cases referred to in *Ex parte United States, supra,* as having limited *In re Massachusetts* and *In re Glaser.* The essence of the Act of 1925 was curtailment of our appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions. It is hardly consonant with this restrictive purpose of the Act of 1925 to enlarge the opportunities to come to this Court beyond the limit recognized and enforced under the Act of 1891—that there can be no ancillary jurisdiction where the litigation on the merits could not directly come here for review. In only one of the cases since the Act of 1925 in which the ancillary writs were invoked in situations in which this Court did not have direct appellate jurisdiction, did counsel call to the attention of this Court the bearing of the Act of 1925 upon the power to issue ancillary writs and the relevance of cases prior to that Act, and in no case did this Court apparently address itself to the problem now canvassed. Authority exercised *sub silentio* does not establish jurisdiction. Throughout its history it has been the firm policy of this Court not to recognize the exercise of jurisdiction under such circumstances as precedents

when the question is first sharply brought for decision. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354-55; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170.

In deciding whether to give a latitudinarian or a restricted scope to the appellate jurisdiction of this Court, the important factor is the number of instances in which applications for the exercise of the Court's jurisdiction has been or may be made, not the number of instances in which the jurisdiction has been exercised. And so it tells little that less than ten applications for mandamus have been granted since the Act of 1925. What is far more important is that merely for the first seven Terms after that Act not less than seventy-two applications for such writs were made. Every application consumes time in consideration, whether eventually granted or denied.

Had the Court jurisdiction, this case would furnish no occasion for its exercise. On whatever technical basis of jurisdiction the availability of these writs may have been founded, their use has been reserved for very special circumstances. However varying the language of justification, these ancillary writs have been issued only to further some imperative claim of justice. In the present case, the upshot of these proceedings is to circumvent the intermediate appellate court as the natural and normal resort for relief from a claim of want of jurisdiction in the district court.

No palpable exigency either of national or international import is made manifest for seeking this extraordinary relief here. For all practical purposes the litigation has ceased to concern a vessel belonging to a sister republic. While, to be sure, the legal issues turn on the claim of sovereign immunity by Peru in a vessel libeled in an American harbor, the ship has long since been released and the actual stake of the controversy is a bond. Thus the case for our intervention, to the disregard of the Circuit Court of Appeals, cannot be put higher than the propriety of vindicating the dignity of a friendly foreign state.

But surely this is to introduce the formal elegancies of diplomacy into the severe business of securing legal rights through the judicial machinery normally adapted for the purpose. After all, if the framers of the Constitution had deemed litigation in this Court alone to comport with appropriate regard for the dignity of a friendly foreign state, they would have given this Court original jurisdiction in such cases. If our nearest neighbors

wished to litigate in this country, they could not bring suit in this Court. See *Monaco* v. *Mississippi*, 292 U. S. 313. It is not deemed incompatible with the dignity of the United States itself to begin suit in a district court, have the litigation proceed to the circuit court of appeals, and only by our leave reach this Court. See, *e. g.*, *United States* v. *California*, 297 U. S. 175. Litigation involving the interests of the United States in ships owned by it has twice recently gone through this normal process, and it will not be thought that the dignity of the United States was thereby compromised. Indeed, under the arrangements made by Congress in 1925, measures deemed indispensable for the conduct of the war could be nullified by district courts and could not come here for review until appeal was duly taken to the circuit courts of appeals. To be sure, Congress has wisely provided that once such an appeal is filed this Court in its discretion may bring the appeal here. See, *e. g.*, *White* v. *Mechanics Securities Corp.*, 269 U. S. 283; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 294-95; *Ex parte Quirin*, 317 U. S. 1, 19-20. To require a foreign state to seek relief in an orderly fashion through the circuit court of appeals can imply an indifference to the dignity of a sister nation only on the assumption that circuit courts of appeals are not courts of great authority. Our federal judicial system presupposes the contrary. Certainly this Court should in every possible way attribute to these courts a prestige which invites reliance for the burdens of appellate review except in those cases, relatively few, in which this Court is called upon to adjudicate constitutional issues or other questions of national importance.

To remit a controversy like this to the circuit court of appeals where it properly belongs is not to be indifferent to claims of importance but to be uncompromising in safeguarding the conditions which alone will enable this Court to discharge well the duties entrusted exclusively to us. The tremendous and delicate problems which call for the judgment of the nation's ultimate tribunal require the utmost conservation of time and energy even for the ablest judges. Listening to arguments and studying records and briefs constitute only a fraction of what goes into the judicial process. For one thing, as the present law reports compared with those of even a generation ago bear ample testimony, the types of cases that now come before the Court to a considerable extent require study of materials outside the technical law books. But more important, the judgments of this Court are collective

judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions.

It is therefore imperative that the docket of the Court be kept down, that no case be taken which does not rise to the significance of inescapability for the responsibility entrusted to this Court. Every case that is allowed to come here which, judged by these standards, may well be left either to the state courts or to the circuit courts of appeals, makes inroads upon thought and energy which properly belong to the limited number of cases which only this Court can adjudicate. Even a judge of such unique gifts and experience as Mr. Justice Holmes felt at the very height of his powers, as we now know, the whip of undue pressure in his work. One case is not just one case more, and does not stop with being just one more case. Chief Justice Taft was not the last judge who, as he said of himself, "having a kind heart, I am inclined to grant probably more [discretionary reviews] than is wise." (Hearing before the Committee on the Judiciary, House of Representatives, 68th Cong., 2d Sess., on H. R. 8206, p. 27.)

In a case like this, we should deny our power to exercise jurisdiction. But, in any event, we should refuse to exercise it. By such refusal we would discourage future applications of a similar kind, and thereby enforce those rigorous standards in this Court's judicial administration which alone will give us the freshness and vigor of thought and spirit that are indispensable for wise decisions in the causes committed to us.

Mr. Justice Reed is of the opinion that this Court has jurisdiction to grant the writ requested, *Ex parte United States,* 287 U. S. 241, but concurs in this dissent on the ground that application for the writ sought should have been made first to the Circuit Court of Appeals.

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